86-1152 (1)

NO.

Supreme Court, U.S.
FILED
JAN 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1986

JAMES M. GEORGE
and MARGARET C. GEORGE, et al.
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

14 pp

QUESTION PRESENTED

Whether a corporate agent used by a partnership to hold legal title to the partnership's property -- as required by lenders to comply with State usury laws -- is taxable on income the agent receives on behalf of its principal (but earned exclusively by the partnership/principal), solely because the agent is owned by some of the partners.

The United States Tax Court and the Sixth and Federal Circuits read this Court's decision in National Carbide Corporation v. Commissioner, 336 U.S. 422 (1949), as saying no. The Fourth and Fifth Circuits read the same decision as saying yes.

LIST OF PARTIES

JAMES M. GEORGE and MARGARET C. GEORGE
Lumberton, Mississippi

HOLLIS O. GRAHAM and IDA G. GRAHAM
Ruston, Louisiana

GEORGE A. WOLCOTT and DOROTHY WOLCOTT
Houston, Texas

TUNCAY ERTAN and NONA G. ERTAN
Alexandria, Louisiana

ESTATE OF COMAN S. NORTON, Deceased,
CAROLINE NORTAN,
Testamentary Executrix
Baton Rouge, Louisiana

ROLAND M. TOUPS and KATHRYN B. TOUPS
Baton Rouge, Louisiana

DAVID R. CARPENTER
and ERICA J. CARPENTER
Baton Rouge, Louisiana

CHARLES A. PRINCE and RUTH O. PRINCE
Alexandria, Louisiana

HARRY R. LAYNE and JANET J. LAYNE
Covington, Louisiana

STEPHEN G. ABSHIRE and MARY B. ABSHIRE
Lafayette, Louisiana

JANET F. BAUM, Formerly JANET F. NORTON
Baton Rouge, Louisiana

KENNETH G. FINK, JR. and CAROL FINK
Denham Springs, Louisiana

DONALD L. McCOLLISTER and
SANDRA M. McCOLLISTER
Baton Rouge, Louisiana

ROBERT A. RAYFORD and IRIS B. RAYFORD
Pineville, Louisiana

FREM F. BOUSTANY, SR. and
BEATRICE J. BOUSTANY
Lafayette, Louisiana

FREM F. BOUSTANY, JR. and
ANGELL F. BOUSTANY
Lafayette, Louisiana

SIDNEY FREDERICK and
IRENE S. FREDERICK
Lafayette, Louisiana

ROLAND M. TOUPS and KATHRYN B. TOUPS
Baton Rouge, Louisiana

STATEMENT OF INTERESTED PARTIES

GARY R. FRINK and SHERRY R. FRINK
Luray, Virginia

JOE B. CLARKE, JR.
Lafayette, Louisiana

COMPREHENSIVE PLANNING ASSOCIATES, INC.
Mandeville, Louisiana

PHOPHO COSMAS
San Rafael, California

DONALD G. EDGERTON
Alexandria, Louisiana

WILLIAM G. EMERSON
Carencro, Louisiana

JOSEPH W. GAITREAU
Baton Rouge, Louisiana

GAYLE L. GALLOWAY
Lafayette, Louisiana

M. L. GODLEY
Lecompte, Louisiana

JAMES D. HARDWICK
Alexandria, Louisiana

JAMES W. HARRINGTON
Morgan City, Louisiana

LAKEWAY MANAGEMENT COMPANY
Metairie, Louisiana

FRANK E. LANIER
Hammond, Louisiana

LASSCO, INC.
Mandeville, Louisiana

ESTATE OF LEE McCORMICK
Monroe, Louisiana

LYNN ALAN MEADOWS
New Iberia, Louisiana

MID-STATE SAND & GRAVEL CO., INC.
Alexandria, Louisiana

FRANCIS W. MORIARTY
Lafayette, Louisiana

JUDGE EDMUND REGGIE
Crowley, Louisiana

DELLA ROBIN
Baton Rouge, Louisiana

PETRO J. ROUSSOS
Theodore, Alabama

CHARLES L. SCOTT
Jackson, Mississippi

DARRYL TSCHIRN
New Orleans, Louisiana

NATHAN L. WISE
Jackson, Mississippi

JOHN C. and DESPINA COSMAS YEMELOS
Manalapan, Florida

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1986) .... passim

NO. ____________

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAMES M. GEORGE
and MARGARET C. GEORGE, et al.
Petitioners,

v.

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, James M. George and Margaret C. George, et al., respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceedings on October 24, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 803 F.2d 144, and is reprinted in the Appendix hereto as Appendix C.

The Memorandum Decision of the United States Tax Court entitled Frink v. Commissioner (from which this case was appealed) has been unofficially reported at 49 T.C.M. (CCH) 386 (1984), and has been reprinted herein as Appendix F.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was issued on October 24, 1986 (Appendix C) and petitioner timely sought rehearing. The Petition for Rehearing was denied on December 2, 1986 (Appendix D).

The Jurisdiction of this Court to review the Judgment of the Fourth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

COMPANION CASES

A petition for issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit captioned Frink v. Commissioner of Internal Revenue, filed on even date hereof, arises from the same matter that gives rise to this petition. Petitioners here and petitioners in the Frink case were all petitioners in Frink, et al. v. Commissioner decided by the United States Tax Court on December 27, 1984 (Appendix F), from which appeals were taken to the Fourth Circuit (in which the Frink petitioners reside) and the Fifth Circuit (in which petitioners here reside).

The United States Court of Appeals for the Sixth Circuit in Bollinger v. Commissioner, No. 85-1825, Decided December 2, 1986, (Appendix E) on indistinguishable facts, came to a clearly opposite decision from Frink and George. The trial attorney for the Department of Justice has informally advised that the government will not file a petition for rehearing in Bollinger and, further, that the Solicitor General has not yet reached a decision as to whether a petition for a writ of certiorari will be filed in this Court in Bollinger, or whether he will acquiesce to the petition for writs in Frink and George.

STATEMENT OF THE CASE

This case is the companion case to Frink v. Commissioner, decided by the Fourth Circuit Court of Appeals on August 8, 1986 (Appendix A). A petition for writ of certiorari is being filed in that case simultaneously with the instant petition. That case and this have the same Appendix. The taxpayers in the Frink case and the taxpayers in the instant case were all partners in the same partnership. Because the issues are the same in both cases, petitioners here incorporate by reference the facts and arguments set out in the Frink petition.

If certiorari is granted in the Frink case, it should be granted in the instant case also, and the cases should be consolidated.

Respectfully submitted,

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Counsel for Petitioners

86-1152 ②
NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY R. FRINK and SHERRY R. FRINK,
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COMMISSIONER OF INTERNAL REVENUE,
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JAMES M. GEORGE
and MARGARET C. GEORGE, et al.
Petitioner,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JOINT APPENDIX OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

JOINT APPENDIX
VOLUME I

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-2226

Gary R. Frink,
Sherry R. Frink, Appellees,
versus
Commissioner of Internal Revenue,
Appellant.

No. 85-2227

Gary R. Frink,
Sherry R. Frink, Appellees,
versus
Commissioner of Internal Revenue,
Appellant.

No. 85-2228

Gary R. Frink,
Sherry R. Frink, Appellants,
versus
Commissioner of Internal Revenue,
Appellee.

Appeals from the United States Tax Court. Jules G. Korner, III, Tax Court Judge. (Tax Court Nos. 12544-80; 17023-81)

Argued: June 4, 1986

Decided: August 8, 1986

Before PHILLIPS and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Teresa McLaughlin, Tax Division, United States Department of Justice (Roger M. Olsen, Acting Assistant Attorney General; Michael L. Paup; Ann Belanger Durney on brief) for Appellant/cross-appellee; F. Kelleher Riess (F. Kelleher Riess Corporation on brief) for Appellees/cross-appellants.

BUTZNER, Senior Circuit Judge:

The Commissioner appeals the Tax Court's judgment that a real estate partnership could deduct the losses of

Argo Hotels, Inc., in 1975, 1976, and 1977, because Argo was the nontaxable agent of the partnership. The taxpayers, who were investors in the partnership, appeal the court's judgment allocating 11% of the enterprise's losses to Coastal Golf, Inc.[1] The taxpayers contend that some of these losses were incurred by Argo. Because the taxpayers failed to establish that Argo's relationship with the partnership was not dependent on the partnership's control of Argo, we reverse the court's judgment that Argo was the nontaxable agent of the partnership. See National Carbide Corp. v. Commissioner, 336 U.S. 422, 437 (1949); Ourisman v. Commissioner, 760 F.2d 541, 547-48 (4th Cir. 1985). We affirm the court's judgment allocating 11% of the enterprise's losses to Coastal Golf because this allocation was reasonably based on the evidence introduced at the trial. Furthermore, the court did not abuse its discretion in denying the taxpayers' motion to reopen the case for the presentation of additional evidence concerning the allocation of losses.

---

[1] The taxpayers were partners in commendam. La. Civ. Code Ann. arts. 2839-2851 (West 1952). In all material respects they were limited partners. See Tatum v. Acadian Production Corp., 35 F. Supp. 40, 46 (E.D. La. 1940).

I

The facts are set forth in the Tax Court's opinion and may be summarized here. See Frink v. Commissioner, 1984 T.C.M. (P-H) PP. 84,669, at 2713-22. In 1972, John C. Yemelos formed a real estate partnership for the purpose of developing a hotel in Biloxi, Mississippi. Yemelos later formed an enlarged partnership as new investors, including the taxpayers, joined the venture. At all times, Yemelos's interest in the partnership exceeded 50%, and he was one of two general partners.

Mississippi usury laws limited the amount of interest that could be charged noncorporate borrowers. Because this restriction did not apply to corporate borrowers, an attorney for the lender suggested that Yemelos transfer title to the hotel site of C. M. Conduit, Inc., which the attorney owned. Conduit would hold legal title for the benefit of the partnership and borrow money for the project in return for a $1,000 fee. Yemelos agreed to this arrangement, but the lender objected, in part because of the word "Conduit" in the corporation's name. The parties agreed instead to transfer title to Argo. Yemelos and his wife each owned 50% of Argo and guaranteed its indebtedness. All of the parties to the loan transaction understood that Argo held legal title for the partnership, which was the real owner of the property.

On August 1, 1975, Yemelos and his wife also formed Coastal Golf, which was used to purchase a golf course as part of the hotel project. Unlike Argo, Coastal Golf was not needed to circumvent Mississippi's usury laws. Instead, Yemelos created the corporation in order to limit his personal liability while enabling the lender to carry the full amount of Coastal Golf's promissory note on its financial statements.

Both Argo and Coastal Golf entered into nominee agreements with the partnership. Argo's agreement provided that it would act only for the account of the partnership, the partnership would indemnify it for any loss or liability, and it would hold title solely as nominee for the equitable, legal and beneficial ownership of the partnership. Coastal Golf's agreement provided in similar terms that it held title to the golf course as nominee of the partnership. Neither corporation served anyone besides the partnership. In 1976 Coastal Golf transferred title to the golf course to Argo, and in 1977 Argo transferred title to the hotel and golf course to the partnership. The nominee agreements did not provide for compensation to Argo or Coastal Golf, but in 1980 the partnership paid each corporation $100 for its services. Each reported this income on its tax returns. The Tax Court found that both Argo and Coastal Golf were viable, active corporations that performed extensive business activities during the taxable years in question.

The partnership claimed losses for the construction and operation of the hotel project on its returns for 1975, 1976, and 1977. The taxpayers deducted their distributive share of these losses. The Commissioner determined that the losses were attributable to Argo and Coastal Golf and disallowed the deductions.

The Tax Court held that Argo was the partnership's nontaxable, corporate agent. Therefore, the partnership could deduct Argo's losses. The court also held that Coastal Golf was not the partnership's agent because it acted in its own name and for its own account. Therefore, its losses could not be deducted. The court allocated 11% of the losses to Coastal Golf because the cost of acquiring the golf course was 11% of the total acquisition and construction costs of the project. After the court issued its decision, the taxpayers moved to reopen the case in order to show that Coastal Golf's losses were less than 11% of the project's losses. The court denied this motion.

II

In National Carbide Corp. v. Commissioner, 336 U.S. 422, 437 (1949), the Court ruled that a corporation may act as the nontaxable agent of its shareholders. The Court stated:

> Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent.

National Carbide recognized an exception to the general rule, set forth in Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943), that corporations are separate taxable entities.

In Ourisman v. Commissioner, 760 F.2d 541 (4th Cir. 1985), we considered whether a corporation formed to circumvent state usury laws qualified as the nontaxable agent of a real estate partnership.[2] Reversing the Tax Court, we held that the fifth National Carbide factor -- that the corporation's "relations with its principal must not be dependent upon the fact that it is owned by the principal" -- was a prerequisite to agency status. 760 F.2d at 547-48; accord Roccaforte v. Commissioner, 708 F.2d 986, 989-90 (5th Cir. 1983). The principles explained in Ourisman govern this case.

III

The Tax Court's judgment was largely premised on the fact that there was not a complete identity of ownership in Argo and the partnership. The court noted that Yemelos had a majority interest in the partnership but only had a 50% stake in Argo. Yemelos's wife owned the rest of Argo's stock, but she was not an investor in the partnership. The court ruled that this disparity of ownership interests distinguished this case from Roccaforte in which the investors in the partnership owned the nominee corporation in exact proportion to their partnership interests. The taxpayers argue that Ourisman is also distinguishable because in that case, as in Roccaforte, there was a complete identity of ownership in the corporation and the partnership. The taxpayers contend that Raphan v. United States, 759 F.2d 879 (Fed. Cir. 1985), and Moncrief v. United States, 730 F.2d 276 (5th Cir. 1984), support the court's ruling.

---

[2] The Tax Court in Ourisman held that the corporation was a nontaxable agent. Ourisman v. Commissioner, 82 T.C. 171 (1984), rev'd, 760 F.2d 541 (4th Cir. 1985). Ourisman was pending on appeal when this case was decided.

The taxpayers' reliance on Moncrief is misplaced because the owner of the agent, unlike Yemelos, had less than a 50% interest in the partnership. Raphan is also distinguishable. In that case, although the owner of the agent had a 50% stake in the partnership, the trial court found that there was a sharing of control in the partnership such that no partner had a controlling interest. By contrast, Yemelos always had a majority interest in the partnership. Moreover, there was no showing that Yemelos was unable to control Argo because he only had a 50% stake in the company. Accordingly, we hold that the disparity of ownership interests in Argo and the partnership does not distinguish this case from Ourisman and Roccaforte.

The Tax Court also noted that Yemelos initially agreed to use Conduit as the nominee corporation. Yemelos turned to Argo only after the lender objected to the use of Conduit. None of the investors in the partnership owned stock in Conduit. The taxpayers contend that Yemelos's willingness to use a nominee over which the partnership had no control establishes that the relationship between the partnership and Argo was conducted at arm's length.

Conduit would have charged the partnership a $1,000 fee, but the agreement with Argo did not require the payment of compensation. Ourisman holds that one of the factors to be considered in determining whether an arm's length relationship exists is whether "the agent has entered into a written agency contract . . . providing for a reasonable fee for the agent's services." 760 F.2d at 548. It is inconceivable that Argo would freely agree to perform services without any promise of compensation. Argo was paid $100 in March 1980, but the partnership was not required to make this payment, and it came almost three years after Argo conveyed the hotel to the partnership. Cf. Jones v. Commissioner, 640 F.2d 745, 753-54 (5th Cir. 1981) (fifth National Carbide factor is not satisfied when the amount and timing of compensation is speculative). Therefore, we hold that Yemelos's attempt to utilize Conduit does not establish that the partnership entered into an arm's length agreement with Argo. We also reject the taxpayers' argument that Yemelos's fiduciary obligations as a director of Argo ensured that Argo's relationship with the partnership was conducted at arm's length. The facts simply do not support this theory.

The taxpayers argue that the use of Argo to circumvent Mississippi's usury laws was "a meaningless exercise that should be devoid of tax consequences." They note that the partnership retained equitable title to the property and was responsible for deciding how to operate the hotel project. Therefore, the taxpayers contend, "[t]he doctrine of substance over form demands recognition of the partnership as principal of its corporate nominee."

We cannot accept the taxpayers' argument. The substance of this transaction matches its form because, as the Commissioner emphasizes, Argo's ability to borrow money was premised on its status as a principal rather than as the agent of a non-corporate borrower. The loan papers do not disclose that Argo was acting for any one other than itself.[3]

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[3] The taxpayers assert that Rev. Rul. 31, 1975-1 C.B. 10, and Rev. Rul. 26, 1976-1 C.B. 10, authorized "the use of a nominee corporation owned by the general partner to secure loans [to] its principal partnership as a device to avoid the requirements of New York law." We disagree. These corporations were created, not to avoid the requirements of New York law, but

The evidence establishes that Argo's relationship with the partnership was dependent on Yemelos's 50% ownership of Argo, his majority interest in the partnership, and his position as a general partner. Yemelos created the relationship. Acting for the partnership, he conveyed the hotel site to Argo, defined Argo's function, and guaranteed its debts. In 1977, he terminated the relationship by causing Argo to transfer improved real estate to the partnership for nominal consideration. Applying the test prescribed by National Carbide to these undisputed facts, we

---

rather to comply with New York law in order to obtain funding from state agencies for public housing projects. In return for this funding, the state agencies were authorized to assume control of the corporations from the partnerships if the partnerships failed to develop the housing projects in accordance with state law. Thus, the activities of the corporations were largely regulated by the state. The Service ruled that the relationship between the partnerships and the corporations was not dependent on the partnerships' control of the corporations in light of the state's ability to assume control of the corporations. These rulings are not applicable to the present case because no entity is authorized to divest the partnership of its control of Argo.

reverse the Tax Court's judgment. See National Carbide, 336 U.S. at 437; Ourisman, 760 F.2d at 547-48.

IV

The taxpayers appeal the Tax Court's judgment allocating 11% of the project's losses to Coastal Golf. The taxpayers did not present evidence during the trial concerning the proper allocation of operating losses between Coastal Golf and Argo. Therefore, the court apportioned these losses on the basis of the only available evidence, which was the golf course's share of the project's capital costs. The court subsequently denied the taxpayers' motion to reopen the case for the presentation of evidence concerning the allocation of operating losses.

The taxpayers contend that the golf course's share of the project's operating losses was less than its 11% share of the project's capital costs. They assert that the court's decision is clearly erroneous and that the court abused its discretion in denying their motion to present additional evidence. The taxpayers rely on Stivers v. Commissioner, 360 F.2d 35 (6th Cir. 1966), in which the Tax Court was required to receive additional evidence because the taxpayers were justified in their erroneous belief that failure to introduce the evidence would not affect the Tax Court's decision.

The taxpayers' reliance on Stivers is misplaced because it was foreseeable that the court would treat Coastal Golf and Argo differently in light of Yemelos's different reasons for using the two corporations. Therefore, the taxpayers were not justified in failing to present evidence concerning the proper allocation of losses between the two corporations.

The Tax Court did not err in allocating 11% of the project's operating losses to Coastal Golf. The taxpayers bore the burden of establishing the proper allocation. See Welch v. Helvering, 290 U.S. 111, 115 (1933). However, they did not offer any evidence during the trial. In these circumstances, the court was entitled to make a reasonable approximation on the basis of the evidence available to it. Cohan v. Commissioner, 39 F.2d 540, 543-44 (2d Cir. 1930). Furthermore, the court did not abuse its discretion in refusing to reopen the case to hear additional evidence because the "inexactitude [was] of [the taxpayers'] own making." Cohan, 39 F.2d at 544.

IV

The Tax Court's judgment allocating 11% of the project's losses to Coastal Golf is affirmed. The Court's judgment that the taxpayers can deduct part of Argo's losses is reversed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 85-2226
NO. 85-2227
NO. 85-2228

Gary R. Frink, et al,
Appellees,
versus
Commissioner of Internal Revenue,
Appellant.
[Filed Sept. 16, 1986]

ORDER

The appellees/cross appellants' petition for rehearing and suggesion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Phillips and Judge Chapman.

For the Court,

[Signed] John M. Greacen

CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4786

OPINION

JAMES M. GEORGE and MARGARET C. GEORGE, HOLLIS O. GRAHAM and IDA G. GRAHAM, GEORGE A. WOLCOTT and DOROTHY WOLCOTT, TUNCAY ERTAN and NONA G. ERTAN, ESTATE OF COMAN S. NORTON, Deceased, CAROLINE NORTON, Testamentary Executrix, ROLAND M. TOUPS and KATHRYN B. TOUPS, DAVID R. CARPENTER and ERICA J. CARPENTER, CHARLES A. PRINCE and RUTH O. PRINCE, HARRY R. LAYNE and JANET J. LAYNE, STEPHEN G. ABSHIRE and MARY B. ABSHIRE, JANET F. BAUM, Formerly JANET F. NORTON, KENNETH G. FINK, JR. and CAROL FINK, DONALD L. McCOLLISTER and SANDRA M. McCOLLISTER, ROBERT A. RAYFORD and IRIS B. RAYFORD, FREM F. BOUSTANY, SR. and BEATRICE J. BOUSTANY, FREM F. BOUSTANY, JR. and ANGELL F. BOUSTANY, SIDNEY FREDERICK and IRENE S. FREDERICK, ROLAND M. TOUPS and KATHRYN B. TOUPS.

Petitioners-Appellees-
Cross-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant-
Cross-Appellee.

Filed October 24, 1986

Before: Homer Thornberry, Sam D. Johnson, and Jerre S. Williams, Circuit Judges.

Opinion by Judge Homer Thornberry
Appeals from the Decisions of the
United States Tax Court

SUMMARY

Taxation

Appeals from Tax Court decisions allowing in part limited partners' distributive shares of losses from the development of a hotel. Reversed in part and remanded.

John C. Yemelos formed a partnership named Casren to develop a hotel. Yemelos owned 80 percent of the partnership and his mother-in-law owned the remaining 20 percent. In order to circumvent Mississippi usury law, a 1973 construction loan was structured through a corporation named Argo, which was owned equally by Yemelos and his wife. All of the loan papers described Argo as the owner of the hotel site. In 1975, Yemelos formed Coastal Golf, Inc. (CG) to purchase a golf course in connection with the hotel project. Yemelos and his wife were the sole shareholders of CG. In 1975, Yemelos also converted Casren into the Biloxi Hotel Properties Partnership (BHPP), a limited partnership under Louisiana law. BHPP executed "nominee agreements" with both Argo and CG, which provided that those corporations held only record title to the hotel and golf course and that BHPP was the legal, equitable and beneficial owner. The hotel site and the golf course was conveyed to BHPP in 1977. Three years later, Argo received $100 in return for its services as agent. BHPP reported losses from the hotel project in its returns for 1975 through 1977. As limited partners of BHPP, taxpayers deducted their distributive share of those losses on their individual returns. The Commissioner of Internal Revenue disallowed those deductions after determining that the losses were properly attributable to Argo and not to BHPP. The Tax Court disagreed in part, finding that Argo acted solely as the corporate agent of BHPP with respect to the hotel, but that CG and Argo did not act as agents with respect to the golf course. The Tax Court proceeded to allocate 11 percent of the total losses to the golf course. [1] Accepting that Argo acted as agent for BHPP in developing the hotel, the issue presented is whether that agency relationship depended on Yemelos's ownership of BHPP and Argo because [2] when the relationship between a putative agent and its principal depends on the principal's ownership of the agent, the tax law will not accept the putative agency relationship. [3] Here, the Tax Court found that the divergence of ownership between BHPP and Argo satisfied the independence requirement. However, Yemelos controlled both BHPP and Argo. At all times, Yemelos owned a majority interest in BHPP and he and his wife each owned

50 percent of Argo. [4] On these facts, the taxpayers must prove that the relationship between Argo and BHPP did not depend on their common ownership. [5] In other words, taxpayers must prove that Yemelos and BHPP dealt with Argo at arm's length. [6] However, Yemelos made no provision for compensating Argo in the nominee agreements, and Yemelos paid Argo no compensation during the period Argo actually held title to the assets. It is inconceivable that Argo would have freely agreed to perform services without any promise of compensation. [7] Although taxpayers argue that Argo's relationship with BHPP had to be independent of Yemelos's ownership because Yemelos as general partner owed the limited partners in BHPP a fiduciary duty, any fiduciary duty in favor of the limited partners would limit the compensation that Yemelos could pay Argo in return for agency services. Here, BHPP paid Argo too little, not too much. [8] Because neither Argo nor CG satisfies the independent agency test for the hotel or the golf course, the Tax Court's allocation of loss between

the hotel and golf course need not be considered -- BHPP can deduct losses for neither.

OPINION

HOMER THORNBERRY, Circuit Judge:

Taxpayers were limited partners in the Biloxi Hotel Properties Partnership ("BHPP") and claimed their distributive share of losses from the development of the Biloxi Hilton Hotel. That project included both a hotel and a golf course. The Commissioner disallowed those losses because two corporations, Argo Hotels, Inc. ("Argo") and Coastal Golf, Inc. ("CG"), owned the project during the pertinent period. The Tax Court disagreed with the Commissioner in part: it found that Argo acted as agent for BHPP with respect to the hotel, but that neither Argo nor CG acted as an agent with respect to the golf course. The Tax Court proceeded to allocate 11 percent of the total losses to the golf course. The Commissioner appeals the Tax Court's decision that Argo acted solely as agent for BHPP. The taxpayers cross-appeal the Tax Court's allocation of the loss. We reverse the Tax Court's decision on the question whether Argo acted as an agent. We dismiss the cross-appeals as moot.

Facts

The Tax Court opinion thoroughly describes the transactions at issue. Frink v. Commissioner, 49 T.C.M. (CCH) 386 (1984).[1] We summarize the pertinent facts here. John C. Yemelos formed a partnership named Casren to develop the Biloxi Hilton Hotel. Yemelos owned 80 percent of the partnership and his mother-in-law, Phopho Cosmas, owned the remaining 20 percent. To build the hotel, Yemelos wished to borrow $6.7 million from Mortgage Investors of Washington ("MIW"). Had MIW loaned that money directly to the partnership Casren, the interest rate would have been usurious under Mississippi law. To circumvent the Mississippi usury law, Yemelos and MIW structured the transaction through a corporation. MIW's counsel originally suggested a corporation that he owned named Conduit. Conduit would have charged a fee of $1000. MIW rejected that proposal. The parties then agreed to use a corporation named Argo, of which Yemelos and his wife each owned 50 percent. To that end Yemelos conveyed the land for the hotel to Argo. Yemelos and Argo agreed that:

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[1] The Tax Court decision covered twenty consolidated docket numbers. Taxpayers in 18 of those 20 docket numbers properly appealed to this court. Taxpayers in the remaining two docket numbers appealed to the United States Court of Appeals for the Fourth Circuit. Frink v. Commissioner, 798 F.2d 106 (4th Cir. 1986).

> (1) Argo would act as Yemelos' agent in securing the MIW loan on his behalf; (2) Yemelos would indemnify Argo against all claims arising under the agreement; (3) Yemelos would fund all disbursements incident to the loan; (4) Yemelos would personally guarantee the loan; and (5) Argo would 'transact no business whatsoever for its own account as long as record title to this property and construction project remain in its name.'

Frink, 49 T.C.M. at 390. In 1973 Argo

borrowed the $6.7 million from MIW. In return, Argo executed notes and deeds of trust in favor of MIW. Yemelos and his wife personally guaranteed the entire $6.7 million loan to Argo.

All of these instruments described Argo as the owner of the hotel site. Yemelos and his wife submitted affidavits that Argo was the owner of the hotel site. "It was [MIW's counsel's] understanding, however, that the term 'owner,' as used in this context, related to legal ownership and not to equitable or beneficial ownership of the property." Id. at 391. In addition, "it was similarly the understanding of ... the president of MIW ... that Yemelos was the real borrower with whom MIW was dealing, and that the construction loan was being made to a 'nominee' corporate entity solely because of Mississippi usury laws." Id.

In 1975 Yemelos formed CG to purchase a golf course in connection with the hotel project. Yemelos and his wife were the sole shareholders of CG. CG purchased the Edgewater Golf Course from Bankers Trust Savings and Loan Association ("Bankers Trust"). Yemelos used CG not to circumvent Mississippi usury laws but to limit his personal liability. In accordance with his desire to limit his personal liability on the golf course note, Yemelos personally guaranteed repayment of only $100,000.

In 1975 Yemelos also converted Casren into BHPP, a partnership in commendam (a limited partnership under Louisiana law). Yemelos and Cosmas were general partners, and they initially owned 68.9 percent and 5.3 percent interests respectively. Subsequent additions to the partnership reduced Yemelos's interest to 53.94 percent. BHPP executed "nominee agreements" with both Argo and CG, which provided that those corporations held only record title to the hotel and golf course and that BHPP was the legal, equitable and beneficial owner. Neither agreement was publicly recorded.

The Tax Court found:

> At all times here pertinent, Argo was a viable and active corporation which performed business activities in-

> cluding holding title to real estate, executing mortgages and deeds of trust, negotiating loans, entering into contracts, including a nominee agreement with BHPP, acquiring personal property, subjecting itself to third-party claims during construction, receiving income, incurring expenses, and filing Federal and state income tax returns.

Id. at 394. In 1976 CG transferred the golf course to Argo. In 1977, Argo conveyed the hotel site and the golf course to BHPP. Three years later, in 1980, Argo received $100 in return for its services as agent.

BHPP reported losses totalling over $4 million from the construction and operation of the Biloxi Hilton Hotel project on its returns for 1975 through 1977. As limited partners in BHPP, appellees deducted their distributive share of those losses on their individual returns. The Commissioner disallowed those deductions after determining that the losses were properly attributable to Argo and not to BHPP. The Tax Court disagreed with the Commissioner in part and found as a matter of fact that "Argo served solely as the corporate agent of Casren and/or BHPP with respect to the development of the hotel site." Id. It agreed with the Commissioner that "CG and Argo acted in their own name and for their own account, and not as corporate agents, with respect to their ownership and operation of the golf course." Id.

Appeal

The Commissioner appeals the Tax Court's ultimate finding that "Argo served solely as the corporate agent of Casren and/or BHPP with respect to the development of the hotel site." Id. Because we agree with the Commissioner that the Tax Court's finding is clearly erroneous, we reverse the Tax Court's decision on this point.[2] The fourth circuit reached the same conclusion. Frink v. Commissioner, 798 F.2d 106, 109-10 (4th Cir. 1986).

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[2] The Tax Court's finding on Argo's agency status is one of fact. See Moncrief v. United States, 730 F.2d 276, 282-83 (5th Cir. 1984); Raphan v. United States, 759 F.2d 879, 883 (Fed. Cir.), cert. denied, 106 S.Ct. 129 (1985). We must affirm that finding unless it is clearly erroneous. See 26 U.S.C. Sec. 7482; Fed. R.

[1] The Commissioner argues forcefully that the Tax Court misapplied the "fifth factor" of the agency test set forth in National Carbide Corporation v. Commissioner, 336 U.S. 422, 437 (1949): "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case."[3]

Civ. P. 52(a). The fourth circuit in Frink does not mention the standard of review: "Applying the test prescribed by National Carbide to these undisputed facts, we reverse the Tax Court's judgment." Frink, 798 F.2d at 110. In Ourisman v. Commissioner, the fourth circuit phrased its holding as follows: "The [Tax] [C]ourt made explicit factual findings that we conclude, as a matter of law, preclude an agency finding under the proscription in the fifth factor." 760 F.2d 541, 548 (4th Cir. 1985). We hold simply that the Tax Court's finding is clearly erroneous.

[3] The entire text reads as follows:

> What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor. Whether the corporation operates in the name and for the account of the

Although not entirely satisfied that the Tax Court correctly applied the National Carbide test in other respects,[4] we con-

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> principal, binds the principal, by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent.

National Carbide, 336 U.S. at 437.

[4] Of particular concern is the Tax Court's distinction between Argo and CG. BHPP executed the same nominee agreement with both corporations, and both corporations performed essentially the same services. In addition, "[a]s with Argo, neither the note nor Yemelos's partial guarantee described CG as an agent." Frink, 49 T.C.M. at 397. The Tax Court treated CG differently than Argo for two reasons. First, Yemelos's purpose in using CG was to limit his personal liability as opposed to circumventing the Mississippi usury laws. The objective relationship between BHPP and Argo or CG, not Yemelos's purpose in using the corporate form, should determine whether the corporation acted as an agent. Moreover, the Tax Court's analysis suggests that Yemelos was only liable on those

fine our decision to whether the Tax Court erred in determining that Argo's relationship with BHPP did not depend on

notes through his personal guaranties. In that case, neither corporation actually bound anyone but itself on those notes, and both MIW and Bankers Trust were in the same position with respect to the property and the corporate borrower -- MIW simply had an additional guaranty. If Argo was Yemelos and BHPP's agent, then it should have been able to bind them as primary obligors and the guaranties would have been superfluous. Second, the Tax Court reasoned that there was no evidence (like the testimony of MIW's counsel and president) that Bankers Trust regarded CG as merely a title holder for Yemelos. The Tax Court's reliance on MIW's subjective understanding of the transaction seems misplaced given that MIW required Yemelos and his wife to submit affidavits stating that Argo owned the hotel site.

Our concern with the Tax Court's finding that Argo acted as BHPP's agent is "bottomed upon [our] inability ... to accept the proposition that [Argo] was not the substantive law owner of the assets." Miller, The Nominee Conundrum: The Live Dummy is Dead, but the Dead Dummy Should Live, 34 Tax L. Rev. 213, 254 (1979).

> It seems quite clear that any doubts should be resolved against taxpayers who have failed to make crystal clear the nature of the corporation's ownership. Moreover, the court would be fully justified in refusing to act upon the basis of documents kept hidden in files until produced for the purpose of resisting the tax collector.

Id. at 267 n. 134 (citation omitted).

Yemelos's ownership of Argo. In other words, we accept for the purposes of this opinion that Argo acted as agent for BHPP and not in its own name in developing the hotel site. This opinion addresses the question whether that agency relationship depended on Yemelos's ownership of BHPP and Argo.

[2] Initially, we reaffirm our conclusion in Roccaforte v. Commissioner that the independence requirement is mandatory. 708 F.2d 986, 989-90 (5th Cir. 1983). The Supreme Court's language in National Carbide allows no other result. Accord Frink, 798 F.2d at 109; Ourisman v. Commissioner, 760 F.2d 541, 547-48 (4th Cir. 1985). When the relationship between a putative agent and its principal depends on the principal's ownership of the agent, the tax law will not accept the putative agency relationship.

[3] Taxpayers may satisfy the independence requirement by showing either that the principal did not own the agent or that the agency relationship did not

depend on such ownership. Taxpayers argue in their brief that "not only were the limited partners not owners of Argo, but Argo was only fifty (50%) percent owned by one of two general partners." The Tax Court agreed that the divergence in ownership between BHPP and Argo satisfies the independence requirement. See Frink 49 T.C.M. at 398. We disagree. "[C]ommon control may legally exist in either of two ways[:] the principal can own a controlling interest in the agent or the same parties may own or control both principal and agent...." Raphan v. United States, 759 F.2d 879, 883 (Fed. Cir.), cert. denied, 106 S.Ct. 129 (1985). We conclude that Yemelos controlled both BHPP and Argo. At all times Yemelos owned a majority interest in BHPP. In addition, he owned 50 percent of Argo and his wife owned the other 50 percent. The facts indicate that Yemelos controlled Argo, and the taxpayers do not dispute that. For example, Argo performed without promise of compensation substantial services for which Conduit would have charged $1000.

[4] In Raphan, the court upheld the Claims Court's finding that a corporation wholly owned by one of two equal partners was the agent for the partnership. Id. at 883-84. There, however, the court rejected the government's assertion that one of the two equal partners totally dominated the other, finding instead that the two partners intended to share control. The Tax Court made no such finding in this case. Indeed, such a finding is implausible. The taxpayers also cite Moncrief v. Commissioner, 730 F.2d 276 (5th Cir. 1984). In that case the sole owner of the corporate agent had only a 25 percent interest in the principal. In this case, however, Yemelos owned a majority interest in the principal and shared control of the agent with his wife. On these facts, we hold that the taxpayers must prove that the relationship between Argo and BHPP did not depend on their common ownership.[5]

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[5] Even before Roccaforte, commentators recognized that it was safer to use an unrelated corporate agent. See, e.g., B. Bittker & J. Eustice, Federal Income Taxations of Corpora-

[5] "'[T]he significant criteria, as we understand them, are whether the so-called "agent" would have made the agreement if the so-called "principals" were not its owners, and conversely whether the "principals" would have undertaken the arrangement if the "agent" were not their corporate creature.'" Roccaforte, 708 F.2d at 990 (quoting Harrison Property Management Co. v. United States, 475 F.2d 623, 627 (Ct.Cl. 1973), cert. denied, 414 U.S. 1130 (1974)). In other words, taxpayers must prove that Yemelos and BHPP dealt with Argo at arm's length. See Ourisman, 760 F.2d at 548.

[6] Yemelos made no provision for compensating Argo in the nominee agreements. Yemelos paid Argo no compensation during the period that Argo actually held title to the assets. Argo

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tions and Shareholders PP. 2-10 at 2-29 (4th ed. 1979) ("These uncertainties, coupled with the hostile attitude of courts in recent years to claims that a corporation is the agent or nominee of its shareholders, suggest that cautious taxpayers may be well advised to use unrelated third-party entities for nominee functions.").

finally received $100 in 1980, three years after it had transferred all of the assets to BHPP. "It is inconceivable that Argo would freely agree to perform services without any promise of compensation." Frink, 798 F.2d at 110; see also Roccaforte, 708 F.2d at 990 n.4; Jones v. Commissioner, 640 F.2d 745, 753-54 (5th Cir.), cert. denied, 454 U.S. 965 (1981); Roccaforte v. Commissioner, 77 T.C. 263, 287 (1981), rev'd, 708 F.2d 986 (1983). Moreover, Argo acted as an agent for no one other than Yemelos and BHPP. See Roccaforte, 708 F.2d at 990 n.4; Ourisman, 760 F.2d at 548.

Taxpayers argue that Yemelos's willingness to use Conduit, a corporation in which he owned no stock, demonstrates the independence of Argo's relationship with BHPP. MIW rejected that arrangement "at least in part because it did not approve of the word 'conduit' in the corporate name."[6]

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[6] MIW's aversion to the name Conduit may indicate that it wanted Argo and not Yemelos, Casren, or BHPP to be the actual owner of the land. That MIW required affidavits from Yemelos and

Frink, 49 T.C.M. at 390. Yemelos may have been willing to use an unrelated corporate agent, but he did not do so. That Conduit would have charged $1000 for the same services that Argo performed without any promise of compensation buttresses our conclusion that Yemelos did not deal at arm's length with Argo.

[7] Taxpayers also argue that Argo's relationship with BHPP had to be independent of Yemelos's ownership because Yemelos as general partner owed the limited partners in BHPP a fiduciary duty. Any fiduciary obligation in favor of the limited partners would limit the compensation that Yemelos could pay Argo in return for agency services. Here, BHPP paid Argo too little, not too much. We therefore reject taxpayers' argument that Yemelos's fiduciary duty demonstrates that he bargained at arm's length with Argo for agency services.[7]

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his wife stating that Argo was the "owner" as opposed to the holder of mere legal title supports that view. Those observations, however, relate to the findings of an agency relationship in the first place and not to the independence of that relationship.

Conclusion

[8] The Tax Court found that "the relationship of Argo ... to Casren and BHPP was not dependent upon the ownership and control of the former ... by the latter two entities." Frink, 49 T.C.M. at 398. That finding is clearly erroneous. Accordingly, we reverse the Tax Court's decision to the extent that it treats Argo as the agent for BHPP. The Tax Court allocated the loss between the hotel and the golf course only after it determined that Argo acted as an agent for the hotel, but that neither Argo nor CG acted as an agent for the golf course. Because we hold that neither Argo nor CG satisfies the agency test of National Carbide for the hotel or the golf course, we need not consider the Tax Court's allocation of loss between the hotel and the golf course -- BHPP can deduct losses for neither.[8]

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[7] We distinguish Rev. Rul. 75-31, 1975-1 C.B. 10, and Rev. Rul. 76-26, 1976-1 C.B. 10, for the reasons stated in Frink, 798 F.2d at 110 n.3.

[8] The taxpayers argue in their brief that they presented no evidence on the proper allocation of the total loss because they "were wholly

Accordingly, we dismiss the cross-appeals as moot. We remand the case for further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

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unaware that the Court would arrive at different conclusions regarding Argo and Coastal Golf."

Appeals from the Decision of the
United States Tax Court

Before THORNBERRY, JOHNSON,
and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of the Commissioner of Internal Revenue for review of orders of the United States Tax Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the United States Tax Court in this cause is reversed, and the cause is remanded to the Tax Court for further proceedings in accordance with the opinion of this Court. IT IS FURTHER ORDERED that the cross-appeals in this cause are dismissed as moot.

IT IS FURTHER ORDERED that petitioner-appellees cross-appellants pay to respondent-appellant cross-appellee the costs on appeal, to be taxed by the Clerk of this Court.

October 24, 1986

ISSUED AS MANDATE:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4786

JAMES M. GEORGE, ET AL.,
Petitioners-Appellees
Cross Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant
Cross-Appellee.

[Filed Dec. 2, 1986]

Petition for Review of an Order of the
United States Tax Court

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10-24-86, 5 Cir., 198__,
______ F.2d ______)

(December 2, 1986)

Before THORNBERRY, JOHNSON and WILLIAMS,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

(   ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

(   ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam D. Johnson

United States Circuit Judge REHG-6

11-26-87 [sic]

APPENDIX E

Recommended for Full Text Publication
See Sixth Circuit Rule 24

NO. 85-1825
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Appeal from the
United States Tax Court

JESSE C. BOLLINGER, JR.; EDWARD H. PETER, JR. and MARY H. PETER; PAUL W. HENSLEY and MARY N. HENSLEY; JESSE C. BOLLINGER, JR. and SUZ-ANNE BOLLINGER; JESSE C. BOLLINGER, JR. and JACQUELINE BOLLINGER; JESSE C. BOLLINGER, JR. and SUZ-ANNE C. BOLLINGER,

Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

Decided and Filed December 2, 1986

Before: ENGEL and NORRIS, Circuit Judges; and COHN, District Judge.*

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*The Honorable Avern Cohn, United States District Judge, Eastern District of Michigan, sitting by designation.

ALLEN E. NORRIS, Circuit Judge. Respondent, Commissioner of Internal Revenue, appeals from orders of the United States Tax Court allowing to petitioners income tax deductions for losses generated by the construction and operation of apartment complexes.

Because the Tax Court made extensive findings of fact, the recitation of facts which follows is a summary of those findings.

Petitioner, Jesse C. Bollinger, was a real estate developer who, both individually and in partnership with other petitioners, developed a number of apartment complexes in Kentucky. In order to obtain construction financing, financial institutions required that the nominal debtor be a corporate nominee of the sole proprietorship or partnership seeking the financing. Accordingly, record title to the various properties was held by a corporation as a device to comply with Kentucky law, which provided that lending money to a non-corporate borrower at the market rate of interest prevailing at the time in question was usurious.[1]

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[1] The Tax Court developed a chart showing the apartment complexes constructed, the entities constructing them, the interest of the individuals in the various constructing entities, and the corporate nominee holding title:

		Individual's Interest in the Partnership						
Apartment Complex	Partnership	Bollinger	Peter	Hensley	George Martin	Samuel Zell	Robert Laurie	Title
1.Creekside North*	*	100%						Creekside Inc (1)
2.Carriage Hill	Carriage Hill	66-2/3%		33-1/3%				Creekside Inc
3.Creekside South	Creekside South	50%	50%					Creekside Inc
4.Les Chateaux	Les Chateaux	33-1/3%	33-1/3%	33-1/3%				Creekside Inc (Sold Sept 1971)
5.Lamp-lighter	Lamp-lighter	33-1/3%	33-1/3%	33-1/3%				Creekside Inc
6.Two Lakes	Two Lakes:							
	7/16/71-9/10/74	50%				50%		Creekside Inc
	9/10/74-2/6/75	2%				98%		Howard Walker Trustee
	After 2/6/75	0				100%		Howard Walker Trustee
7. Ski Lodge*	*	100%						Creekside Inc (Sold 1975)
8. Colister	Cloister							Cloisters Inc
	7/15/73-1/4/74	50%			50%			(Until 12/31/74) (2)
	1/4/74-11/5/75	9-1/2%			9-1/2%	81%		Greenland VistaInc (3)
	After 11/5/75	0			0		19%	(After 12/31/74)

*Sole proprietorship

(1)Creekside, Inc., a Kentucky corp. wholly owned by Bollinger.

(2)Cloisters, Inc., a Kentucky corp. wholly owned equally by Bollinger and Martin.

(3)Greenland Vistas, Inc., a Delaware corp. in which petitioners had no interest.

The circumstances surrounding Bollinger's development of Creekside North Apartments are typical of those related to the other developments. When he sought a construction loan and permanent financing for the project, he was advised by financial institutions that, in view of Kentucky usury laws, they would require that Bollinger's corporate nominee be the debtor and record titleholder. He obtained a commitment for permanent financing from Massachusetts Mutual Life Insurance Company, in which the company agreed to make a loan to "the corporate nominee of Jesse C. Bollinger, Jr."; the loan was to be secured by a mortgage on the apartments and by a personal guaranty from Bollinger.

After consulting with his accountant and attorney, Bollinger incorporated Creekside, Inc., for the sole purpose of having a corporate nominee for securing financing for the development of his apartment projects. He was the corporation's sole shareholder. Bollinger and Creekside, Inc., entered into an agreement which generally provided that the corporation would hold title to

Creekside North Apartments, as Bollinger's agent, only for the purpose of securing temporary and permanent financing of the project.

To finance construction of the apartments, Bollinger, through Creekside, Inc., borrowed the funds from Citizens Fidelity Bank and Trust Company. The corporation executed all the loan documents, and then transferred the loan proceeds to Bollinger's individual construction account.

Bollinger acted as general contractor during the construction of Creekside North Apartments, and costs of construction were paid from his construction account. Upon completion, Bollinger, through Creekside, Inc., obtained permanent financing from Massachusetts Mutual Life, with the loan being secured by a mortgage upon the apartments and a partial personal guaranty by Bollinger. The loan proceeds were used to pay off the construction loan from Citizens Fidelity.

The Tax Court also found that Bollinger intended to retain all but record title to the apartment complex; that he intended that the corporation would convey record title to him as soon as feasible; that no tax-avoidance scheme was present; and that, by incorporating Creekside, Inc., Bollinger sought none of the traditional insulating benefits of a corporate shareholder. Bollinger employed a resident manager to rent the apartments, execute leases, collect rents, and maintain operating records.

Operation of Creekside North Apartments generated losses in 1969, 1971, 1972, 1973, and 1974, and ordinary income in 1970, 1975, 1976, and 1977. Both the income and losses were reported by Bollinger on his individual income tax returns.

Pursuant to a substantially identical pattern, petitioners secured financing for the construction of the other apartment complexes through the use of a corporate nominee. Each partnership actively managed its apartment complex and reported income and losses on its partnership tax returns. Petitioners, in turn, reported their distributive shares of the partnership income and losses on their individual returns.

Creekside, Inc., acted as corporate nominee for six of these projects, and Cloisters, Inc. (which was owned equally by Bollinger and another investor), as nominee for the seventh project. The lenders regarded Bollinger or the respective partnerships as the owners of the apartments, required partial personal guaranties from them, and looked to them for repayment. Creekside, Inc., and Cloisters, Inc., had no liabilities, assets, employees or bank accounts, nor did they manage the apartment complexes.

The Commissioner disallowed the loss deductions claimed by Bollinger and the other partners, taking the position that the losses were those of the corporation which held title to the real estate.

In siding with the petitioners, the Tax Court held that they had clearly established that the corporations were acting as agents, and the losses were therefore attributable to the sole proprietorships or partnerships.

The manifest purpose of the income tax is to tax income to those persons or entities that earn or otherwise create the right to receive income and enjoy its benefit when paid. Helvering v. Horst, 311 U.S. 112, 119 (1940); 26 U.S.C. Secs. 1 and 11. Normally, the tax consequences of business transactions involving real property will fall upon its owner, since that is who customarily conducts the business and has the right to collect and enjoy the income. However, it does not follow that a nominal owner will be taxable, where there is transferred to him, as agent, the bare legal title, with the equitable owner retaining for himself the real and beneficial ownership.

The difficulty, in situations where the purported principal-equitable owner has an ownership interest in the corporation which holds nominal title, lies in determining whether there is a true agency relationship between the two, or whether there is such a kinship and similitude between the two, that the purpose of the income tax would be thwarted if an agency relationship were to be recognized. See, e.g., Moline Properties, Inc. v. Comm'r of Internal Revenue, 319 U.S. 436 (1943).

The Supreme Court, in National Carbide Corp. v. Comm'r of Internal Revenue, 336 U.S. 422 (1949), enunciated principles which are instructive in the resolution of this appeal. That case involved an arrangement, formalized by contract, where a parent corporation utilized its wholly owned subsidiaries as operating companies to manufacture and sell goods. Under the contract, the parent provided working capital, executive management, and office facilities to the subsidiaries, termed "agents," which, in turn, paid substantially all the profits from their manufacturing and sales operations to the parent. The Commissioner took the position that all the income turned over to the parent was taxable to the subsidiaries.

The Supreme Court sided with the Commissioner, disregarded the agency agreement, and noted that, under the circumstances of that case, the parent and subsidiaries operated with such oneness of purpose that the enterprise could as well have been conducted by a single corporate entity. 336 U.S. at 436. Because the agency contract added nothing to the relationship which existed in fact, it could be disregarded so that the tax consequences might follow the reality of the circumstances.

However, the Supreme Court pointed out that this conclusion did not foreclose under all circumstances a "true corporate agent . . . from handling the property and income of its owner-principal without being taxable therefor." 336 U.S. at 437. Where generally recognized attributes of an agency relationship are present,[2] a controlled corporation can still be a true agent if its relations with its principal are not dependent upon the fact that it is owned by its principal, and its business purpose is the carrying on of the normal duties of an agent. Id. In other words, inquiry must be made whether the agent would have made the agreement if the principal were not its owner and, conversely, whether the principal would have undertaken the relationship if the agent were not its corporate creature. See Harrison Property Management Co., Inc. v. United States, 475 F.2d 623 (Ct. Cl. 1973), cert. denied, 414 U.S. 1130 (1974).

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[2] The Supreme Court listed these attributes:

> Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists.

336 U.S. at 437.

Because one would not expect an independent agent to perform all the work and then turn over the profits to its principal, in exchange for only nominal compensation, it is readily apparent that the purported agency relationship in National Carbide could not have existed in the absence of ownership and control of the subsidiary.

By contrast, holding nominal title is the kind of task customarily undertaken by independent agents. Thus, it cannot be said that the agency relationship in this case was dependent upon the fact of common ownership and control, in the sense that in the absence of common ownership and control an agent would not assume the duty of holding nominal title, and a principal would not entrust that duty to an agent. A corporation unrelated to the principals could just as well have been entrusted to hold nominal title to avoid usury problems, while the principals retained the real and beneficial functions of property ownership.

The Tax Court observed that petitioners desired to operate their business either as sole proprietorships or partnerships, and were thwarted in completely doing so only by the practical requirement that they form corporations in order to comply with state usury laws. They did not attempt to avail themselves of the normal benefits of doing business in the corporate form; indeed, they conducted the businesses in individual and partnership capacities, remaining subject to the claims of creditors and others. Nor did they use the corporations as part of a tax-avoidance scheme. This is not, therefore, a situation where a taxpayer has embraced the advantages of doing business as a corporation and, so, in fairness, must be held to the burdens as well as the benefits of the corporate form.

Accordingly, the Tax Court did not err in finding that the attributes of a true agency relationship were present under the circumstances presented by this case, and the decision of the Tax Court is consistent with the Supreme Court's opinion in _National Carbide_.

As one might expect, the factual situation before us is not unique; is has been the subject of review by other Courts of Appeals. In a case involving similar facts, _Ourisman v. Comm'r of Internal Revenue_, 760 F.2d 541 (4th Cir. 1985), the Fourth Circuit reversed a holding by the Tax Court that a corporate nominee was a true agent of the developer-partnership. In doing so, the court rejected the Tax Court's understanding that the requirement of _National Carbide_ that relations between the agent and principal must not be dependent upon the fact that the agent is owned by the principal, is satisfied where the corporate nominee acted no differently than an independent agent would have acted if the agent had bargained with its principal for its services at arm's length. Instead, the Fourth Circuit assigned a "literal" interpretation to that requirement, holding that the taxpayer's evidence must establish that the agency relationship was, in fact, an arm's length arrangement. This, in essence, is the position we are urged by the Commissioner to adopt. A similar result was reached in Roccaforte v. Comm'r of Internal Revenue, 708 F.2d 986 (5th Cir. 1983), although that case is easily distinguishable on its facts.[3]

The Fourth Circuit's reading of the Supreme Court's requirement is subject to the criticism that it exalts form over substance, when the facts of that case are viewed in the context of the court's own characterization of its holding:

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[3] The Commissioner also relies upon an opinion of the Court of Appeals for the Federal Circuit as supporting its position [Vaughn v. United States, 740 F.2d 941 (Fed. Cir. 1984)], but that case is also readily distinguishable upon its facts since, unlike the instant case, the activities of the purported corporate agent were inconsistent with a claim of agency. Moreover, in a later case, Raphan v. United States, 759 F.2d 879 (Fed. Cir.), cert. denied, 106 S.Ct. 129 (1985), that same Court of Appeals affirmed a judgment of the Court of Claims which had held that a principal-agency relationship did exist, and approved a review by the trial court of the National Carbide factors which was strikingly similar to the review undertaken in this case by the Tax Court. See Raphan v. United States, 3 Cl. Ct. 457 (Cl. Ct. 1983), aff'd in part, rev'd in part, 759 F.2d 879 (Fed. Cir.), cert. denied, 106 S.Ct. 129 (1985).

> Such a result simply recognizes the fact that if the agency relationship could not exist but for the shareholders' ownership and control of the corporate agent, the alleged agency relationship is nothing more than a manifestation of the underlying corporation-shareholder relationship and that the corporation therefore must be regarded as a separate taxpaying entity under our system of separate taxation of corporations.

760 F.2d at 549.

In our view, when the evidence establishes that the attributes of an agency are present, and the corporate nominee conducts itself no differently than would an independent agent which had bargained with its principal for its services at arm's length, then, even under the Fourth Circuit's "but for" test, a true principal-agent relationship has been proved. When the Supreme Court, in National Carbide, said that, under certain circumstances, a true corporate agent is not foreclosed from handling the property and income of its owner-principal without being taxable, it could not have contemplated so strict a reading of circumstances that, as a practical matter, the existence of a true agency would be foreclosed. What the Supreme Court demanded was an inquiry into the actual substance of the relationship to determine if an agency existed in fact. Here, by any realistic assessment, the corporations acted like agents. When one surveys the circumstances of this case, one is hard-pressed to divine the harm which must be guarded against by adopting the Commissioner's position. Accordingly, we decline to follow the Fourth Circuit's view, as expressed in Ourisman.

The orders of the Tax Court are affirmed.

③ 86-1151

③ 86-1152

NO.

Supreme Court, U.S.
FILED
JAN 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY R. FRINK and SHERRY R. FRINK,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JAMES M. GEORGE
and MARGARET C. GEORGE, et al.
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JOINT APPENDIX OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

JOINT APPENDIX
VOLUME II

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T. C. Memo. 1984-669

UNITED STATES TAX COURT

GARY R. FRINK AND

SHERRY R. FRINK, et al.[1] Petitioners

v. COMMISSIONER OF INTERNAL REVENUE,

Respondent

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[1] By our Order dated January 9, 1984, granting petitioners' motion to consolidate, which was not opposed by respondent, cases of the following petitioners were consolidated herewith: James M. George and Margaret C. George, Docket No. 14917-81; Gary R. Frink and Sherry R. Frink, Docket No. 17023-81; Hollis O. Graham and Ida G. Graham, Docket No. 26983-82; George A. Wolcott and Dorothy Wolcott, Docket No. 26984-82; Tuncay Ertan and Nona G. Ertan, Docket No. 26985-82; Caroline Norton, Executrix, Estate of Coman S. Norton, Docket No. 26986-82; Roland M. Toups and Kathryn B. Toups, Docket No. 26987-82; David R. Carpenter and Erica J. Carpenter, Docket No. 26988-82; Charles A. Prince and Ruth O. Prince, Docket No. 26989-82; Harry R. Layne and Janet J. Layne, Docket No. 26990-82; Stephen G. Abshire and Mary B. Abshire, Docket No. 26991-82; Janet F. Baum, Docket No. 26992-82; Kenneth G. Fink, Jr. and Carol Fink, Docket No. 26993-82; Donald L. McCollister and Sandra M. McCollister, Docket No. 26994-82; Robert A. Rayford and Iris B. Rayford, Docket No. 27128-82; Frem F. Boustany, Sr. and Beatrice J. Boustany, Docket No. 27291-82; Frem F. Boustany, Jr. and Angell F. Boustany, Docket No. 27292-82; Sidney Frederick and Irene S. Frederick, Docket No. 4048-83; Roland M. Toups and Kathryn B. Toups, Docket No. 7720-83.

Filed December 27, 1984.

[Served Dec. 27, 1984]

Docket Nos. 12544-80, 14917-81, 17023-81, 26983-82, 26984-82, 26985-82, 26986-82, 26987-82, 26988-82, 26989-82, 26990-82, 26991-82, 26992-82, 26993-82, 26994-82, 27128-82, 27291-82, 26292-82, 4048-83, 7720-83.

D. Irvin Couvillion,
for the petitioners.

Kathleen O. Lier, A. Albert Ajubita,
for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

KORNER, *Judge*: Respondent determined deficiencies and additions to tax against petitioners in these cases as follows:[2]

Petitioners	Docket No.	Tax year ended	Deficiency
Gary R. Frink	12544-80	12/31/75	$10,253.00
Sherry R. Frink		12/31/76	6,203.00

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[2] Respondent has conceded the additions to tax under sec. 6651(a), which he had determined as to petitioners Norton and Baum in Docket Nos. 26986-82 and 26992-82, respectively.

Petitioners	Docket No.	Tax year ended	Deficiency
James M. George	14917-81	12/31/75	15,285.90
Margaret C. George		12/31/76	18,621.70[3]
		12/31/77	5,131.77
Gary R. Frink	17023-81	12/31/77	2,400.85
Sherry R. Frink			
Hollis D. Graham	26983-82	12/31/75	26,405.00
Ida G. Graham		12/31/76	13,972.00
George A. Wolcott	26984-82	12/31/75	11,404.65
Dorothy Wolcott		12/31/76	6,484.33
		12/31/77	3,935.53
Tuncay Ertan	26985-82	12/31/75	13,869.00
Nona G. Ertan		12/31/76	6,920.00
		12/31/77	2,943.00
Caroline Norton, Executrix, Estate of Coman S. Norton[4]	26986-82	12/31/76 12/31/77	15,040.17 2,914.00

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[3] Petitioners George concede $3,000.50 of this deficiency, as determined by respondent for 1976.

[4] This determination and that made in Docket No. 26992-82, were made with respect to the joint and several liability of Coman Norton,

Petitioners	Docket No.	Tax year ended	Deficiency
Roland M. Toups	26987-82	12/31/75	25,605.00
Kathryn B. Toups		12/31/76	43,014.00
David R. Carpenter	26988-82	12/31/77	21,447.00
Erica J. Carpenter			
Charles A. Prince	26989-82	12/31/76	755.60
Ruth O. Prince			
Harry R. Layne	26990-82	12/31/75	22,901.00
Janet J. Layne		12/31/76	1,411.00
		12/31/77	1,252.00
Stephen G. Abshire	26991-82	12/31/75	19,681.00
Mary B. Abshire		12/31/76	11,543.00
		12/31/77	2,472.00
Janet F. Baum	26992-82	12/31/76	15,040.17
		12/31/77	2,914.00

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deceased, and Janet F. Baum (formerly Janet F. Norton), his wife during the years in issue and petitioner in the latter case.

Petitioners	Docket No.	Tax year ended	Deficiency
Kenneth G. Fink, Jr.	26993-82	12/31/77	62,804.00
Carol Fink			
Donald L. McCollister	26994-82	12/31/77	10,085.00
Sandra M. McCollister			
Robert A. Rayford	27128-82	12/31/75	30,029.40
		12/31/76	13,225.61
Iris B. Rayford		12/31/77	11,502.20
		12/31/78	7,271.00[5]
Frem F. Boustany, Sr.	27291-82	12/31/75	34,596.40
Beatrice J. Boustany		12/31/76	47,530.52
		12/31/77	65,870.90
Frem F. Boustany, Jr.	27292-82	12/31/76	31,687.00
Angell F. Boustany		12/31/77	31,658.00
Sidney Frederick	4048-83	12/31/76	31,195.21
Irene S. Frederick		12/31/77	12,213.90
Roland M. Toups	7720-83	12/31/77	39,265.00
Kathryn B. Toups			

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[5] Petitioners Rayford concede the deficiency determined against them for 1978.

By amended answers, respondent asserted additional deficiencies, resulting in the following increased deficiencies in three of the foregoing cases:[6]

Petitioners	Docket No.	Tax Year ended	Increased deficiency
David R. Carpenter Erica J. Carpenter	26988-82	12/31/77	$23,727.00
Kenneth G. Fink, Jr. Carol Fink	26993-82	12/31/77	69,239.00
Donald L. McCollister Sandra M.McCollister	26994-82	12/31/77	11,165.00

After concessions, the issues remaining for our decision are: (1) Whether losses generated by the construction and operation of the Biloxi

---

[6] Increased deficiencies asserted by amended answer by respondent in Docket Nos. 27291-82, 27292-82, and 7720-83, were conceded by respondent at trial.

Hilton Hotel project are attributable to two corporations, styled Argo Hotels, Inc. and Coastal Golf, Inc., which held legal title thereto, or to the individual petitioners herein, as partners in commendam[7] in Biloxi Hotel Properties Partnership; and (2) whether the allocations of losses provided for in the written agreement of such partnership, as amended, possessed substantial economic effect in 1977 as to the three petitioners who entered the partnership as partners in commendam on December 16, 1977.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulations of facts and exhibits attached thereto are incorporated herein by this reference.

Petitioners, who resided in the following locations at the times they filed their petitions herein, filed their Federal income tax returns for the years in issue with the following Internal Revenue Service Centers:

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[7] In all material respects, a partner in commendam under La. Civ. Code Ann. art. 2839-2851, (West 1952), is a limited partner. Tatum v. Acadian Production Corp., 35 F. Supp. 40 (E.D. La. 1940).

		Returns		
Petitioners	Residence	Year	Date filed	Service center
Gary R. Frink	Luray,	1975	4/15/76	Cincinnati,
	Virginia	1976	4/15/77	Ohio
Sherry R. Frink	Annapolis,	1977	4/15/78	
	Maryland			
James M. George	Lumberton,	1975	4/15/76	Atlanta,
Margaret C. George	Mississippi	1976	4/15/77	Georgia
		1977	4/14/78	
Hollis O. Graham	Ruston,	1975	4/15/76	Austin,
Ida G. Graham	Louisiana	1976	4/15/77	Texas
George R. Wolcott	Houston,	1975	4/15/76	Austin,
	Texas	1976	4/15/77	Texas
Dorothy Wolcott		1977	4/15/78	
Tuncay Ertan	Alexandria,	1975	4/15/76	Austin,
Nona G. Ertan	Louisiana	1976	4/15/77	Texas
		1977	4/15/78	

		Returns		
Petitioners	Residence	Year	Date filed	Service center
Caroline Norton	Baton Rouge,	1976	4/15/77	Austin,
Executrix, Estate of	Louisiana	1977	4/15/78	Texas
Coman S. Norton				
Roland M. Toups	Baton Rouge,	1975	4/15/76	Austin,
Kathryn B. Toups	Louisiana	1976	4/15/77	Texas
		1977	4/15/78	
David R. Carpenter	Baton Rouge,	1977	4/15/78	Austin,
Erica J. Carpenter	Louisiana			Texas
Charles A. Prince	Alexandria,	1976	4/15/77	Austin,
Ruth O. Prince	Louisiana			Texas
Harry R. Layne	Mandeville,	1975	4/15/76	Austin,
Janet J. Layne	Louisiana	1976	4/15/77	Texas
		1977	4/15/78	
Stephen G. Abshire	Lafayette,	1975	4/15/76	Austin,
Mary B. Abshire	Louisiana	1976	4/15/77	Texas
		1977	4/15/78	
Janet F. Baum	Baton Rouge,	1976	4/15/77	Austin,
	Louisiana	1977	4/15/78	Texas

Petitioners	Residence	Returns		
		Year	Date filed	Service center
Kenneth G. Fink, Jr. Carol Fink	Denham Springs,	1977	4/15/78	Austin, Texas
Donald L. McCollister Sandra M. McCollister	Baton Rouge, Louisiana	1977	4/15/78	Austin, Texas
Robert A. Rayford Iris B. Rayford	Alexandria, Louisiana	1975	4/15/76	Austin, Texas
		1976	4/15/77	
		1977	4/15/78	
Frem F. Boustany, Sr. Beatrice J. Boustany	Lafayette, Louisiana	1975	4/15/76	Austin, Texas
		1976	4/15/77	
		1977	4/15/78	
Frem F. Boustany, Jr. Angell F. Boustany	Crowley, Louisiana	1976	4/15/77	Austin, Texas
		1977	4/15/78	
Sidney Frederick Irene S. Frederick	Lafayette, Louisiana	1976	4/15/77	Austin, Texas
		1977	4/15/78	

In 1972, John C. Yemelos (hereinafter "Yemelos") and his mother-in-law, Phopho Cosmas (hereinafter

"Cosmas"), formed a partnership or joint venture known as Casren Development Company (hereinafter "Casren"). Yemelos owned 80 percent of Casren, and Cosmas owned the remaining 20 percent. In that same year, Casren undertook the project of developing the Biloxi Hilton Hotel, a commercial resort and convention-oriented hotel to be constructed in Biloxi, Mississippi.

By warranty deed dated November 6, 1972, acting on behalf of Casren, Yemelos acquired title in his own name to 7.5 acres of land located in Biloxi, Mississippi (hereinafter "hotel site").

In December of 1972, Yemelos applied to Hilton Inns, Inc. for a license or franchise to operate a Hilton hotel, relative to which a fee of $20,000 was paid. On August 20, 1973, Hilton Inns, Inc. issued a license or franchise to operate a Hilton Hotel for a period of 20 years to Yemco, Inc. (hereinafter "Yemco"), which was a corporation whose sole shareholders were Yemelos and Cosmas.

By deeds both dated September 24, 1973, again acting on behalf of Casren, Yemelos purchased in his own name two additional strips of land adjoining the hotel site. These parcels, known as Vapors Club and Stag Club, were purchased for a total consideration of $376,566.99.

On October 2, 1975, acting on behalf of Casren, Yemelos purchased an additional five acres of land from the Small Business Administration (hereinafter "S.B.A. parcel") for a total consideration of $210.000. Title to the S.B.A. parcel remained in Yemelos' name until July 29, 1977, at which time it was transferred by warranty deed to an entity known as Biloxi Hotel Properties Partnership.

Seeking construction financing for the hotel project, Yemelos was referred in 1973 to a real estate investment trust located in the Washington, D.C. area, known as Mortgage Investors of Washington (hereinafter "MIW"). On April 17, 1973, MIW executed a Mortgage Loan Commitment in favor of Yemco, wherein it committed to loan $6,700,000 for the construction of a seven-story, convention-oriented hotel on the hotel site in Biloxi, Mississippi. The loan commitment called for an interest rate of 4-1/2 percentage points in excess of the prime interest rate of Chemical Bank of New York, to be adjusted monthly. The commitment further provided that Yemelos and his wife were to supply MIW with an irrevocable letter of credit in its favor from Colonial Bank of New Orleans (hereinafter "Colonial") in the amount of $500,000.

Both yemelos and MIW were aware that the interest to be charged by MIW for construction of the hotel would be usurious under Mississippi law if made to an individual or a partnership.[8]

In negotiations concerning the construction financing, MIW was represented by Charles R. Galloway (hereinafter "Galloway"), an attorney whose practice was located in Gulfport, Mississippi. Galloway's services were engaged through Henry Sarpy of New Orleans, Louisiana, another attorney who represented MIW on occasion. When Yemelos and his accountant, Ronald F. Gregory, first met with Galloway concerning the construction loan, they discussed the foregoing usury problem under Mississippi law. To avoid this problem, Yemelos and Gregory indicated that they wished to use a so-called "conduit corporation" to borrow the funds from MIW. Galloway understood that this term meant a corporation which would hold legal title to property as an agent for the holder of equitable title, in order to facilitate financing arrangements with respect to such property.

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[8] Pursuant to Miss. Code Ann. Sec. 75-17-1 (1972), as to non-corporate entities, the "legal rate" of interest in 1973 was 6 percent per annum, but contracts could be made for payment of a rate as high as 8 percent.

Also during 1973, Yemelos was involved in the formation of a new corporation, known as Argo Hotels, Inc. (hereinafter "Argo"). On April 12, 1973, Argo was incorporated by Yemelos under the laws of the State of Louisiana. Argo was formed, as stated in its Articles of Incorporation, for the following purposes:

> To hold title to real estate, to borrow money and make loans on said real estate for the ac-

> count of and for the beneficial interest of its stockholders and to take such other action in connection with such real estate as may be required of it by the beneficial owner or owners thereof, and to engage in any other lawful activity for which corporations may be formed under the Louisiana business Corporation Law.

Yemelos and his wife, Despina Cosmas Yemelos, were the sole officers, directors and shareholders of Argo, but they paid no consideration for their stock.

Yemelos and Gregory suggested to Galloway that Argo could be used as a "conduit" for the purpose of avoiding local usury restrictions. Galloway responded that he already owned a conduit corporation, styled "C. M. Conduit" (hereinafter "Conduit"), which he had used to avoid similar problems in the past, and which could be used in this instance. Galloway preferred to use Conduit for this purpose since he believed that it was important to separate the legal and equitable ownership of the property, an objective which he felt would not be served by use of Yemelos' corporation, Argo.

Galloway, who was the sole shareholder and, together with his children, was a director of Conduit, described the purpose of the corporation as follows:

> [T]o have a corporate body, having a real business purpose, for use by persons who needed to borrow money, and for one reason or other, frequently because of the interest rate, found it necessary to make the loan through a corporation rather than through an individual.

For its services, Conduit typically charged a fee of $1,000, although that sum would vary depending upon the size of the loan, the time periods involved, and the risks assumed by the corporation. In this instance, Galloway advised, Conduit's fee would be $1,000.

Several weeks following his meeting with Galloway, Yemelos accepted the recommendation to use Conduit, in connection with the MIW financing, pursuant to the foregoing terms. In accordance with this decision, Galloway prepared a set of specimen documents and sent them to Henry Sarpy in New Orleans with a request that they be submitted to MIW for its approval.

After a period of several weeks, Galloway was advised that MIW had rejected the use of Conduit, at least in part because it did not approve of the word "conduit" in the corporate name. Since it was the only other option then under consideration, and in view of the shortness of time before the scheduled closing, Galloway and Yemelos decided that Argo should receive legal title to the subject property.

On October 5, 1973, Yemelos and Argo entered into a trust agreement, pursuant to which it was agreed, inter alia, that: (1) Argo would act as Yemelos' agent in securing the MIW loan on his behalf; (2) Yemelos would indemnify Argo against all claims arising under the agreement; (3) Yemelos would fund all disbursements incident to the loan; (4) Yemelos would personally guarantee the loan; and (5) Argo would "transact no business whatsoever for its own account as long as record title to this property and construction project remain in its name."

Argo qualified to do business in the State of Mississippi on October 8, 1973. On the application to so qualify Argo, Yemelos described the purposes of the corporation as follows:

> to hold title to real estate, to borrow money and to make loans on said real estate and to take such other action with such real estate as may be required of it by the beneficial owner or owners thereof.
>
> [Emphasis added.]

In connection with MIW's loan in the amount of $6,700,000, which was supplemented in May of 1974, and again in May of 1975, in the respective amounts of $500,000 and $800,000, for a total loan of $8,000,000, the following pertinent documents were executed on the dates shown:

(1) October 10, 1973 - a warranty deed, whereby Yemelos conveyed to Argo

title to the hotel site for the sum of $100;

(2) October 10, 1973 - a conditional assignment of the Hilton license or franchise by Yemco to MIW, as partial security for the construction financing;

(3) October 10, 1973; May 17, 1974; May 12, 1975 - notes and deeds of trust, executed by Argo in favor of MIW in the respective amounts of $6,700,000, $500,000 and $800,000;

(4) October 10, 1973; May 17, 1974; May 12, 1975 - building loan agreements, wherein Argo and MIW agreed to certain advances for certain stages of construction;

(5) October 10, 1973; May 17, 1974; May 12, 1975 - continuing construction loan guarantees, wherein Yemelos and his wife personally guaranteed MIW's loans to Argo; and

(6) October 10, 1973; May 17, 1974[9]

---

[9] The date of another affidavit, executed in connection with the $800,000 supplemental financing in 1975, cannot be determined on this record.

- affidavits executed by Yemelos and his wife for the purpose of inducing MIW to lend Argo the subject construction funds.

None of the foregoing notes, deeds of trust, building loan agreements or continuing construction loan guarantees describe Argo as an "agent," "nominee" or "conduit" corporation. Each of the foregoing affidavits provides that Argo is the "owner" of the hotel site. It was Galloway's understanding, however, that the term "owner," as used in this context, related to legal ownership and not to equitable or beneficial ownership of the property.

On October 10, 1973, Argo also entered into building contracts with two separate building companies for construction of a portion of the hotel project, in each of which Argo was described as "owner." Yemelos owned 50 percent of each such building company.

On October 9, 1973, pursuant to the terms of MIW's initial loan commitment, Colonial issued an irrevocable letter of credit in favor of MIW for the account of Argo for a sum not to exceed

$500,000. As security therefor, on October 10, 1973, Argo executed a deed of trust in favor of Colonial in the amount of $550,000. This deed of trust was subordinate to the deed of trust in favor of MIW.

One Edward J. DeMartini was an attorney in Louisiana who represented Colonial as well as Argo, and who was additionally a director of Colonial. DeMartini and Galloway in early October of 1973, and Galloway again in May of 1974, advised MIW in writing that its documentation for the loan to Argo would establish "valid and binding obligations of the persons or entities purporting to be bound thereby * * *." At such times, however, DeMartini and Galloway, as well as Colonial, believed that Argo held solely legal title to the hotel properties, and that it held such title as agent for Yemelos.

At all times here pertinent, it was similarly the understanding of Peyton Fletcher III, the president of MIW, that Yemelos was the real borrower with whom MIW was dealing, and that the construction loan was being made to a "nominee" corporate entity solely because of Mississippi usury laws.

During construction of the hotel, most draws from MIW were paid to Galloway and deposited by him into a trust account which he maintained. Funds were then disbursed from such account directly to each contractor or supplier upon verification that the services or materials had been provided. Some checks for construction work were made payable to Argo, but these checks were deposited in Casren's bank account.

On June 10, 1974, Omicron Corporation (hereinafter "Omicron") was formed under the laws of the State of Mississippi by Yemelos, his wife and Cosmas. Yemelos was the sole shareholder of Omicron. Omicron performed all management services for the Biloxi Hilton Hotel, receiving a fee in the amount of two percent of the gross revenues collected by it.

In April of 1975, the Biloxi Hilton Hotel project was completed and placed in service.

On August 1, 1975, Coastal Golf, Inc. (hereinafter "CG") was formed under the laws of the State of Mississippi by Galloway and one Robert C. Galloway, for the following purposes:

> To acquire and operate golf courses, tennis courts, amusement parks and other properties providing private and public entertainment, and generally to engage in the business of owning and operating places of amusement, entertainment and recreation.

Yemelos was CG's president, and Yemelos and his wife were its sole shareholders and, together with Galloway, directors.

On August 19, 1975, CG purchased from Bankers Trust Savings and Loan Association (hereinafter "Bankers Trust") for the sum of $1,045,000, an established golf course, known as the Edgewater Golf Course (hereinafter "golf course"), which was situated near the Biloxi hotel project. It was intended that the golf course would be maintained as part of the hotel facility. Acting as CG's president, Yemelos executed a note for the full amount of the purchase price, of which he also personally guaranteed repayment of $100,000. In neither the note nor the guarantee is CG described as an "agent," "nominee" or "conduit" corporation.

In structuring the sale of the golf course it was Yemelos' wish to limit his personal liability to $100,000, a wish to which the bank acceded because it had previously foreclosed on the golf course and was anxious to sell it. While Yemelos' interests might have been met by his execution of a partial recourse note in favor of Bankers Trust, it was apparently the bank's interest to carry a recourse indebtedness in the full amount of the note as a current asset on its financial statements, and this interest could not be met through such a partial recourse financing arrangement. It was accordingly decided by both parties that title to the golf course would be held by CG, that Bankers Trust would make its recourse loan to the corporation, and that such loan would be guaranteed by Yemelos to the limited extent of $100,000. Unlike the construction financing provided by MIW, there was no usury problem under Mississippi law associated with Bankers Trust's loan for acquisition of the golf course.

As a result of cost overruns during construction of the hotel and excessive losses during its start-up period, in late 1975, Yemelos contacted Robert G. Jackson, an attorney who was involved in real estate syndications, concerning the possibility of admitting new investors into Casren. Jackson was aware that the hotel site and golf course were titled in the names of Argo and CG, but he also believed that those corporations held title as "nominees," and that it was Casren which really owned the project.

Jackson and Yemelos held a number of meetings to discuss the capital contributions which would be made by investors, their return on capital, the equity Yemelos was to retain as general partner, and the fee Yemelos would receive. Such discussions took account of the combined investments of Yemelos and Cosmas in the project, the risks assumed by Yemelos, which were greater than those assumed by general partners in other syndications handled by Jjackson, and the services provided for the project by Yemelos and the corporations which he controlled.

Initially, Yemelos sought an equity interest in the partnership of over 60 percent plus a six percent management fee for Omicron. It was the equity interest which was most important to him, however, and it was ultimately decided that he would receive an approximate equity interest of 65 percent, but the management fee of only two percent for Omicron would be maintained.

On December 1, 1975, a private placement memorandum was issued, soliciting investors in the partnership. The memorandum recited, inter alia, that the partnership would own and operate the project, but that legal title to the hotel and golf course would be held by two nominee corporations, Argo and CG, for the equitable and beneficial interest of the partnership.

On December 30, 1975, Casren applied for authority to sell limited partnership interests in Mississippi, and the application was granted the next day. The interests were to be sold through the conversion of Casren under

Louisiana law to a partnership in commendam, to be known as the Biloxi Hotel Properties Partnership (hereinafter "BHPP"). On December 31, 1975, articles of partnership in commendam for BHPP were executed, but for undisclosed reasons they were not registered with the State of Louisiana until September 17, 1981.

On December 31, 1975, two so-called "nominee agreements" were executed. In one such agreement, reciting that certain real estate and improvements for the hotel project had been "placed in the record name" of Argo by Yemelos in October 1973, it was agreed by Argo and BHPP that: (1) Argo would act only for the account of BHPP; (2) BHPP would indemnify Argo against any loss or liability arising through its actions; (3) Argo held title solely as nominee for BHPP; and (4) title to the real estate comprising the hotel project "is for the equitable, legal and beneficial ownership of [Casren] * * * which * * * has since been converted into [BHPP]." In the second nominee agreement, which was between CG and BHPP, it was declared in similar terms that CG held title to certain real estate and improvements for the hotel project solely as nominee for BHPP. Neither of these agreements were publicly recorded in Louisiana or Mississippi.

Also on December 31, 1975, the following documents were executed relative to the hotel project properties: (1) A warranty deed, by which Yemelos conveyed the Vapors Club and Stag Club parcels to BHPP; and (2) a document executed by Yemelos and his wife, in their capacities as individuals and not as partners, purporting to convey to BHPP, all of their beneficial interests in any properties held by Argo and CG, and declaring that BHPP was the legal and equitable owner of such properties.

Pursuant to BHPP's articles of partnership, Yemelos and Cosmas were named as general partners, and they owned 68.9 percent and 5.3 percent partnership interests, respectively. The remaining 25.8 percent ownership interest was divided among the partners in commendam, included among whom were twelve of the petitioners in this case.

The partners in commendam admitted on December 31, 1975, contributed cash and notes in the total amount of $2,317,700 for their foregoing interest. Yemelos and Cosmas contributed the balances in their capital accounts in Casren in the respective amounts of $142,600 and $450,000.

As a result of continued financial problems, on November 9, 1976, BHPP's articles were amended to provide for the addition of new partners in commendam. Under the amended articles, the interests of Yemelos and Cosmas were reduced to approximately 61.76 percent and 5 percent, respectively. The remaining 33.24 percent interest was divided between the existing partners in commendam, who now owned a collective interest of approximately 23.24 percent, and the new partners in commendam, who contributed a total of $1,042,650 for a collective interest of 10 percent, and included among whom were an additional two of the petitioners herein.

At the request of BHPP, on December 27, 1976, CG conveyed title to the golf course to Argo. In consideration of

Argo's grant of a lien on the golf course to MIW (which lien was to be subordinate to that of Bankers Trust), and of BHPP's agreement to expressly assume joint and several liability with Argo relative to its $8,000,000 indebtedness to MIW, the latter on the same date agreed to limit the extent to which it might have recourse to the partners of BHPP in any action to enforce such indebtedness. Also on December 27, 1976, MIW agreed to modify the continuing loan guaranty provided by Yemelos and his wife on May 17, 1974, so as to limit their liability to the approximate sum of $3,950,000. In the documentation executed relative to the foregoing agreements to which MIW was a party, the declaration was made repeatedly that Argo held title to the subject properties for the benefit of BHPP.

On December 16, 1977, as a result of continued operating losses, BHPP's articles were once again amended to provide for the addition of new partners in commendam. Under the amended articles, the interests of Yemelos and Cosmas were reduced to approximately

53.94 percent and 4.35 percent, respectively. The remaining 41.71 percent interest was divided between the new and existing partners in commendam, six of whom were so-called "newly admitted" partners, and included among whom were an additional three of the petitioners herein. These latter three newly admitted partners in commendam, petitioners Carpenter, Fink and McCollister, acquired partnership interests of .5, 1.488 and .3 percentages, respectively, in return for contributions of $50,000, $148,800 and $30,000, respectively. Together, the six newly admitted partners acquired a partnership interest of 5.888 percent.

At the end of 1977, petitioners Carpenter, Fink and McCollister registered positive capital account balances in BHPP, in the respective amounts of $978, $2,910, and $587.

Under the second amended articles, for all years following 1980, all items of partnership income, gain, loss, deduction or credit were generally to be allocated to the partners in proportion to their ownership interests. For 1977 through 1980, however, such items would be allocated among the partners in certain prescribed percentages, with 97.2 percent of such items allocated to the six "newly admitted" partners for the period December 16, 1977 through December 31, 1977.

In the event of the liquidation or termination of BHPP, any partner in commendam having a deficit balance in his capital account would not be required to contribute to the partnership or to its creditors the amount of such deficit balance, nor would any such partner receive a proportionately smaller share of partnership assets under the foregoing partnership agreements. Pursuant to the second amendment to the partnership agreement, upon a sale of all or part of BHPP's property, the proceeds would be distributed, in the sole discretion of the general partners, to certain preferred groups, and then in the following percentages to the generic groupings of partners in commendam described:

Partners in commendam	Allocable percentage
Existing	52.148
Additional	26.048
Increasing	7.094
Newly admitted	14.710

Within the foregoing groupings, the proceeds were required to be distributed in proportion to each partner's ownership of "partnership stock," as defined in the agreement.

The percentage ownership interests of those partners in commendam in BHPP who are petitioners herein, were as follows as of the date of each of the foregoing amendments to its partnership articles:

Petitioner	Percentage interest		
	12/31/75	11/9/76	12/16/77
James M. George	.60	-[10]	-
Coman S. Norton	.30	-	-
Roland M. Toups	.60	1.60	1.9255
Hollis O. Graham	.60	-	-
Gary R. Frink	.30	-	-
Harry R. Layne	.60	-	-
Frem F. Boustany, Sr.	.60	1.60	2.251
George A. Wolcott[11]	.30	-	-
Robert A. Rayford	.60	-	-
Stephen G. Abshire	.45	-	-
Charles A. Prince	.30	-	-
Tuncay Ertan	.30	-	-
Frem F. Boustany, Jr.		1	1.3255
Sidney Frederick		1	-
Donald L. McCollister			.3
David R. Carpenter			.5
Kenneth G. Fink			1.488

All of the partners' capital contributions to BHPP were deposited into bank accounts maintained either by

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[10] A dash indicates that there was no change in the partner's ownership interest.

[11] In an apparent misspelling, Wolcott is referred to in the articles as "Wilcott."

Omicron, doing business as the Biloxi Hilton, or by BHPP. To the extent that portions of the capital contributions made by certain partners were in the form of promissory notes in favor of BHPP, such notes were always made payable to BHPP.

At all times here pertinent, Argo was a viable and active corporation which performed business activities including holding title to real estate, executing mortgage and deeds of trust, negotiating loans, entering into contracts, including a nominee agreement with BHPP, acquiring personal property, subjecting itself to third-party claims during construction, receiving income, incurring expenses, and filing Federal and state income tax returns. Similarly, CG was a viable and active corporation which performed business activities essentially comparable to those performed by Argo.

No bank accounts were ever opened in the names of Argo or CG. No capital was ever contributed to either corporation, and neither corporation had any employees.

On July 29, 1977, the hotel site, golf course and other properties were transferred to BHPP, at its request, as follows:

Transferor	Property
(1) Argo	Hotel property and golf course
(2) Argo and CG	Golf course personal property
(3) Omicron, CG and Yemco	All hotel personal property
(4) Yemelos, individually	S.B.A. parcel

Also in July of 1977, permanent financing for the hotel was closed with Equitable Life Assurance Society of the United States.

On March 7, 1980, a fee of $100 was paid to Argo, and reported by it on its 1980 Federal income tax return. A fee of $100 was paid to CG on the same date, and reported by it on its 1980 Federal income tax return.

On its returns for 1975, 1976 and 1977, BHPP claimed the following losses attributable to the construction and operation of the Biloxi Hilton Hotel project:

Period		Net Loss
12/31/75		$684,999.00
1/1/76 - 10/31/76		969,358.94
11/1/76 - 12/31/76		598,594.00
1/1/77 - 7/28/77		575,447.00
7/29/77 - 12/15/77		704,741.00
12/16/77 - 12/31/77		593,913.00
	Total	$4,127,052.94

Corporate income tax returns were filed in the name of Argo for each of those same years, and in the name of CG for 1976 and 1977, reflecting neither income, deductions nor tax liability, and reciting that each corporation was a nominee which transacted no business for its own account. No Federal income tax return was filed by CG for 1975.

On their individual returns, petitioners deducted their distributive shares of the losses reported by BHPP for the foregoing years. In his notices of deficiency, respondent disallowed those deductions, determining that the losses were properly attributable to the corporate entities, Argo and CG, rather than to the partnership.

OPINION

Issue I. Attribution of losses

The first issue for decision is whether the losses incurred by the construction and operation of the Biloxi Hilton Hotel project are attributable to Argo and/or CG, as respondent contends, or to BHPP, as petitioners contend. In particular, petitioners contend that the corporations acted solely as agents of the partnership, holding record title to the properties and obtaining project financing on behalf of the partnership solely because of local usury restrictions, in the case of Argo, and solely at the instigation of Bankers Trust, in the case of CG. As such, petitioners conclude, it is the partnership, as the principal, which is responsible for the tax consequences of the hotel project. Respondent answers that the losses generated by the project are properly attributable to the corporations since no agency relationship between them and BHPP has been established for tax purposes.

In two recent Court reviewed opinions, Roccaforte v. Commissioner, 77 T.C. 263 (1981), revd. 708 F.2d 986 (5th Cir. 1983), and Ourisman v. Commissioner, 82 T.C. 171 (1984), on appeal (4th Cir., June 25, 1984), we have carefully considered the issue of whether a corporation will be treated as a nontaxable agent for a partnership. In each of those cases, the taxpayers formed a partnership to construct and operate certain real estate developments. In order to secure financing for each project, the lenders required that the nominal borrower be a corporation in order to avoid local usury restrictions. As in the present case, corporations were formed which acquired record title to the properties involved and executed documents necessary to secure project financing. In each case, at least a number of the partners personally guaranteed the loans, and it was the understanding of the partners as well as the lenders that the corporation was to act as agent for the partnership, holding record title to the properties while the partners remained the true owners of the properties involved. In neither case did the corporation have any assets

(other than record title to the properties) or perform services for any parties other than the partnership.

Looking to the six-part test established by the Supreme Court in National Carbide Corporation v. Commissioner, 336 U.S. 422, 437 (1949), we held on the facts and circumstances in Roccaforte and Ourisman that the corporations there involved acted as agents of their respective partnerships, which remained the true owners of the projects, and that it was therefore the partnerships to which the tax consequences of the construction and operation of such projects flowed. The factors which comprise the National Carbide test are: (1) Whether the corporation operates in the name and for the account of the partnership; (2) whether the principal is bound by the actions of the corporate agent; (3) whether the corporate agent transmitted the money received to the partnership; (4) whether receipt of income is attributable to the assets or employees of the partnership; (5) whether the corporate agent's relationship with the partnership was dependent on the fact that it was owned and controlled by the partners; and (6) whether the corporation's activities were consistent with the normal duties of the agent.[12]

We believe that the facts disclosed in the instant case, viewed in light of these six National Carbide factors, compel the conclusion that for Federal income tax purposes, it was BHPP, and not Argo, that was the owner of the Biloxi

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[12] In Roccaforte v. Commissioner, 77 T.C. 263 (1981), revd. 708 F.2d 986 (5th Cir. 1983), the Fifth Circuit, reversing the findings of this Court, held that the fifth National Carbide factor is mandatory and absolute. 708 F.2d at 989. However, in Ourisman v. Commissioner, 82 T.C. 171 (1984), on appeal (4th Cir. June 25, 1984), we disagreed with the Fifth Circuit's holding on this point, and followed our decision in Roccaforte. Since, with the exception of Docket Nos. 12544-80 and 17023-81, with respect to which appeal would lie to the Fourth Circuit, appeal of the remaining eighteen of the instant docket numbers would lie to the Fifth Circuit, we are bound to follow the holding of the Fifth Circuit in Roccaforte with respect to such cases - that the fifth factor of National Carbide is mandatory and absolute. Golsen v. Commissioner, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971). As to Docket Nos. 12544-80 and 17023-81, however, we shall adhere to our holdings in Roccaforte and Ourisman.

Hilton Hotel, but that it was CG and later Argo, and not BHPP, that were the owners of the golf course associated with such hotel.

As to Argo, as early as 1973, when Yemelos and his accountant first met with Galloway concerning construction financing, the subject of the usury problem under Mississippi law was discussed and Yemelos stated his wish to use a conduit corporation, a term which Galloway understood to mean a corporate agent which holds title for the equitable owner of property. Yemelos formed Argo in Louisiana for the purpose, inter alia, of taking certain actions relative to real estate to which it held title "as may be required of it by the beneficial owner or owners thereof * * *," and this purpose was reiterated in the application by which Yemelos later sought to qualify Argo to transact business in Mississippi. At that time, the owner of the hotel site was Casren, in which Yemelos had an 80 percent controlling interest.

After MIW's rejection of the use of Galloway's corporate nominee, Conduit, as the agent which would hold title to the hotel property, it was decided that Argo would serve in such capacity. Argo's agency status was clearly disclosed in its October 5, 1973 trust agreement with Yemelos, and with the advent of BHPP as Casren's successor in December of 1975, in its nominee agreement with that partnership. Pursuant to both such agreements, Argo was prohibited from transacting any business for its own account.

While it is true that the 1975 nominee agreement was not publicly recorded, the evidence amply demonstrates that the primary institutions involved in financing the hotel project were aware of Argo's status as an agent. Both Galloway, acting as counsel to MIW, and Edward J. DeMartini, acting as counsel to and a director of Colonial, were aware that Argo held legal title to the hotel site solely as agent for Yemelos. DeMartini further testified that Argo's agency status was discussed at Colonial's director's meetings. The president of MIW, Peyton Fletcher III, confirmed that he was aware that Yemelos was the real borrower, and that his company was loaning the construction funds to a nominee corporation solely because of local usury laws. Fletcher also testified that he neither requested financial statements nor inquired as to the financial history or status of the corporate nominee, Argo.

Consistent with the conclusion that MIW was well aware of Argo's agency status, the extensive documentation relating to agreements between Argo, BHPP and MIW executed on December 27, 1976, is replete with written declarations that Argo held the hotel properties for the benefit of BHPP.

It is also significant that Yemelos and his wife provided a series of continuing construction loan guarantees in 1973, 1974 and 1975, personally guaranteeing the entire $8,000,000 indebtedness to MIW. It is clear that the lending institutions looked with respect to such guarantees to Yemelos in his individual capacity, and not, as contended for by respondent, as a shareholder of Argo. Thus, Colonial's DeMartini testified on cross-examination by respondent as follows:

> Q. So [the nominee corporation] served a convenience for the beneficial owner, correct?
>
> A. Well, no, I do not know if I would put it that way. It was simply * * * a project that was to be done. The person to do it was Mr. Yemelos and he was a valued customer of the bank and I guess [of] MIW also. * * * we were very pleased to have Argo on the note and Argo owning the property so long as we had Mr. Yemelos personally guaranteeing the note * * *.
>
> Q. Because you knew that Mr. Yemelos with his guarantee would at that point pay you back whereas you did not know anything about his wholly owned corporation?
>
> A. As far as I knew the wholly owned corporation did not have

> any assets at all but I was not concerned about that.
>
> Q. Because you knew that he was the borrower - -
>
> A. He was the borrower there was no doubt in my mind * * *. We were making the loan to Mr. Yemelos and we were going to look to Mr. Yemelos for payment.

Similarly, MIW's Fletcher testified that "Mr. Yemelos did put his name on the guarantee agreement and I was looking to the man that had the wherewithal to back up the investment that we were making."

We note, finally, that on its Federal income tax returns for 1975, 1976 and 1977, Argo described itself as a "nominee" corporation which transacted no business for its own account. On this record, petitioners have clearly demonstrated Argo's qualification under the first National Carbide factor with respect to its development of the hotel site.

As acknowledged by petitioners, the situation involving CG, which acquired and held title to the golf course until December 27, 1976, was "entirely different" from that of Argo. Unlike Argo, we have found that CG was used not to avoid local usury restrictions, but to meet the dual interests of Yemelos, who wished to limit his personal liability to $100,000, and of Bankers Trust, which wished to carry the full amount of the $1,045,000 note on its financial statements. There is no evidence in this record to show that these parties intended that CG would serve as an agent to hold title for the beneficial interest of Yemelos. As with Argo, neither the note nor Yemelos' partial guarantee described CG as an agent. In contrast to Argo, however, no representative of the lending institution, Bankers Trust, testified at trial. Yemelos himself testified that the corporate entity was used for the "primary purpose" of limiting his own personal liability. While it is true that CG, like Argo, executed a nominee agreement with BHPP on December 31, 1975, it is clear that the existence of such an agreement is not conclusive proof of an agent-principal relationship. Ourisman v. Commissioner, supra, at 182. In the absence of any corroborative evidence, we conclude that CG was acting in its own name and for its own account during its ownership of the golf course between August 19, 1975 and December 27, 1976.

As to the second National Carbide factor, we have found that the primary project creditors were aware that Argo acted as the corporate agent of Casren, and later, of BHPP. The Argo nominee agreement provided that BHPP remained the real party in interest with respect to the project, and indemnified Argo against any loss or liability arising through its actions relative to the project. Yemelos and his wife personally guaranteed the entire $8,000,000 indebtedness to MIW, and BHPP expressly assumed liability therefor in December of 1976. It is evident that Yemelos, who controlled both Casren and BHPP, and who was a general partner of BHPP, considered himself bound by the acts of Argo.

As to CG, clearly its actions did not bind the partnership. The primary project creditor was not aware that CG acted as a corporate-agent. Furthermore, in the event of a default by CG, the lender would only have had recourse to Yemelos to the extent of his $100,000 guarantee, which represented a small portion of the total indebtedness on the golf course. Yemelos' wish to limit his liability in this manner was a key reason for the use of CG.

Turning to the third National Carbide factor, we note that neither corporation maintained a bank account. During construction of the hotel, most draws from MIW were paid to Galloway, counsel for MIW, who deposited them in a trust account, from which he issued checks to contractors or suppliers. In the few instances where checks were issued to Argo, they were endorsed by Argo and deposited into Casren's bank account. To the limited extent that this factor pertains, therefore, it supports the position of petitioners. See Ourisman v. Commissioner, supra at 183.

As to the fourth National Carbide factor, the corporations in this case had no employees, no assets beyond legal title to the hotel and golf course properties, and in July of 1977, they transferred title to such properties to the partnership. Neither corporation was capitalized, and all stock in each was owned by Yemelos and his wife, individually, and not by Casren or BHPP. At all relevant times, the partners believed themselves to be and generally acted as the owners of the hotel and golf course properties. Acting for Casren and/or BHPP, Yemelos established the putative corporate-agents, after acquiring the hotel site, and performed the activities necessary to arrange for financing, construction and operation of the hotel project. The activities of the corporations were essentially limited to holding record title, executing necessary loan documents, and endorsing certain loan advances to Casren.

It is true, as respondent suggests, that Argo entered into two building contracts for the hotel project in 1973. We find it significant, however, that

Yemelos, who was well aware of Argo's nominee status, and who represented Casren, owned one-half of those building contractor corporations.

We conclude on this record, as we did in Roccaforte and Ourisman, that the income realized from the hotel project and golf course was attributable to the efforts and assets of the partners.[13]

With respect to the important fifth National Carbide factor, as we noted in Ourisman:

> The one crucial question under National Carbide concerns the essential nature of the relationship between the purported corporate agent and its shareholders.* * * The Supreme Court expressly recognized that a corporation could act as an agent for its owners under certain circumstances * * * and specified the indicia of a true agency relationship. There is no indication that the Court intended to deny a corporation the status of agent for its shareholders in spite of the presence of the indicia of agency (factors one through

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[13] See also Bollinger v. Commissioner, T.C. Memo. 1984-560.

> four) merely because the agency is to some extent based upon the shareholders' control of the corporation (factor five).

Ourisman v. Commissioner, supra at 185-186.

In Roccaforte, corporate stock was issued to all partners "in exactly the same percentages as their partnership interest," Roccaforte v. Commissioner, 708 F.2d at 987, and the putative corporate agent was not compensated for its services. On these facts, we found, and the Fifth Circuit concurred, that the corporation's relationship was dependent on the fact that it was owned and controlled by the partners. See also Ourisman v. Commissioner, supra.

On April 20, 1984, the Fifth Circuit decided Moncrief v. United States, 730 F.2d 276 (5th Cir. 1984), distinguishing its earlier holding in Roccaforte on the critical fifth National Carbide factor. In Moncrief, the Fifth Circuit found that the taxpayer had satisfied the fifth factor where, unlike Roccaforte, the corporate stock was not issued to all partners in proportion to their partnership interests, but was wholly owned by the general partner, who held only a 25 percent interest in the partnership. See also Raphan v. United States, 3 Cl. Ct. 457, 461-462 (1983). Acknowledging that there is a "tension" between its holding in Roccaforte that the fifth factor is absolute and mandatory and the Supreme Court's holding in National Carbide that "What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor," National Carbide Corporation v. Commissioner, supra at 430, the Fifth Circuit nonetheless found it unnecessary to reconcile that tension in Moncrief since it was clear that the partnership was not the owner of the corporate agent. Moncrief v. United States, 730 F.2d at 283.

In a recent Memorandum Opinion of this Court, Bollinger v. Commissioner, T.C. Memo 1984-560, finding that the taxpayer had satisfied the fifth National Carbide factor where his wholly-owned corporation performed services for seven partnerships, in five of which he held ownership interests ranging from 33-1/3 percent to 66-2/3 percent, we concluded that "[a]lthough [the corporation] was not compensated for the services it performed, because in at least five developments the partners did not own the stock of the corporation in the same percentage as their partnership interest, we believe that the agency relationship was not based upon the partners' ownership and control of both entities."

In the instant case, Yemelos initially agreed to adopt Galloway's recommendation to employ the services of Conduit, a corporate nominee in which neither he nor any other participant in Casren or partner in BHPP held any ownership interest, for a fee of $1,000. Specimen documents were prepared and transmitted to MIW for its approval. Faced with the opposition of the lending institution to the use of Conduit, however, and in view of the shortness of time before the scheduled loan closing, it was determined that Argo should be employed to hold title to the hotel site, and later, that CG should hold title to the golf course.

All stock in Argo and CG was held by Yemelos and his wife. Yemelos' wife held no interest in Casren or BHPP. In 1975, Yemelos owned an 80 percent interest in Casren. From early 1976 until November of that year, Yemelos owned a 68.9 percent interest in Casren's successor, BHPP. From November of 1976 until the middle of December of 1977, Yemelos' interest was further reduced to 61.76 percent.

While not free from doubt, we are persuaded on balance that the relationship of Argo and CG to Casren and BHPP was not dependent upon the ownership and control of the former two entities by the latter two entities. We thus conclude that the facts of the instant case are distinguishable on this important point from the facts in Roccaforte, and that we are not bound by Golsen v. Commissioner, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971), to follow the result reached by the Fifth Circuit on different facts in that case.

As to the sixth National Carbide factor, we believe that the activities of Argo, but not of CG, were entirely consistent with the normal duties of an agent. It is true that written nominee agreements ascribed an agency status to both corporations. While Argo's agency status was clearly revealed to significant third parties, however, CG's was not. Yemelos and his wife guaranteed the entirety of Argo's indebtedness, but for all except a small portion of CG's indebtedness, no guarantee was provided. The sole purpose of Argo's participation in the hotel project was to acquire financing for the partnership from lenders who wished to circumvent local usury laws, and its activities in pursuit of that purpose were fully consistent with the role of an agent. See Moncrief v. United States, supra at 286. On the other hand, CG was formed, as stated by Yemelos, for the primary purpose of limiting his liability, and we are unable to find in its formation or activities the requisite indicia of a corporate agency.

As we have found, the Biloxi Hilton Hotel project consisted of a number of separate parcels, together with improvements thereto. As to the Vapors Club and Stag Club parcels acquired by Yemelos on behalf of Casren on September 24, 1973, and then conveyed to BHPP on December 31, 1975,[14] and the S.B.A. parcel acquired by Yemelos on behalf of Casren on October 2, 1975, and then conveyed to BHPP on July 29, 1977, we face no issue of corporate agency. However, as to the 7.5 acre hotel site, which was conveyed to Argo on October 10, 1973, and the improvements constructed thereon, our analysis of the six National Carbide factors persuades us that Argo served as the agent of Casren from that date until December 31, 1975, and as the agent of BHPP from the latter date until July 29, 1977, when title thereto was conveyed to BHPP.

As to the golf course, which was acquired by CG on August 19, 1975, our analysis under National Carbide persuades us that CG acted in its own name, for its own account, and not as a corporate agent from that date until December 27, 1976, when title thereto was conveyed to Argo. Furthermore, between December 27, 1976, and July 29, 1977, when title to the golf course was conveyed to BHPP, there is no evidence to persuade us that Argo served as the corporate agent of BHPP as to the golf course property.

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[14] We are unable to conclude on this record that title to these parcels was ever conveyed to Argo, CG or any other purported corporate agent.

It is conceded by respondent that the tax consequences of the hotel project and golf course were properly attributable to BHPP during the period July 29, 1977 through December 31, 1977.

We accordingly conclude that the partnership is entitled to claim all of the losses attributable to the construction and operation of the Biloxi Hilton Hotel project, except for those losses which are attributable to the golf course during the period August 19, 1975 through July 29, 1977. Exercising our best judgment in light of all of the evidence, Cohan v. Commissioner, 39 F.2d 540, 543-544 (2d Cir. 1930), affg. in part and revg. in part 11 B.T.A. 743 (1928), and considering that the cost of acquiring the golf course was approximately 11 percent of the total costs of acquisition and construction of the project,[15] we conclude that, for the periods indicated, the losses claimed by BHPP relative to its construction and operation of the Biloxi Hilton Hotel project are allowable only to the following extent, and that petitioners were entitled to their distributive shares thereof, determined with reference to our disposition of Issue 2, *infra*:

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[15] We have derived this percentage as a ratio of the cost of the golf course to the approximate costs of the entire project, determined as as follows:

Golf course	$1,045,000
Hotel site	225,000
Vapors/Stag parcels	376,566
S.B.A. parcel	210,000
MIW construction loans	6,700,000
	500,000
	800,000
Hilton license or franchise	20,000
Approximate total project costs, exclusive of personal property	$9,876,566

Period	Net loss		
		Hotel Project	Golf Course
	Claimed	Allowed	Disallowed
12/31/75	$ 684,999.00	$ 609,649.11	$ 75,349.89
1/1/76-10/31/76	969,358.94	862,729.45	106,629.48
11/1/76-12/31/76	598,594.00	532,748.66	65,845.34
1/1/77-7/28/77	575,447.00	512,147.83	63,299.17
7/29/77-12/15/77	704,741.00	704,741.00	-0-
12/16/77-12/31/77	593,913.00	593,913.00	-0-
Total	$4,127,052.94	$3,815,928.05	$311,123.88

Issue 2. Allocation of losses

The second issue for our decision is whether the allocation of losses among certain partners in commendam of BHPP possesses substantial economic effect.

As a threshold matter, however, petitioners contend that this matter is in issue solely as to those three petitioners who were newly admitted to the partnership on December 16, 1977 (McCollister, Carpenter and Fink). Respondent contends, on the other hand, that the matter is properly in issue for each petitioner who was a partner in BHPP during 1975, 1976 and 1977. We agree with petitioners.

On brief, respondent makes the representations that "In the notices of deficiency, respondent disallowed certain losses claimed by petitioners * * * as distributive losses from BHPP," and that "The second theory for this disallowance was that the losses were allocated disproportionately, and that such allocation lacked substantial economic effect." Contrary to such representations, however, our examination of the deficiency notices and respondent's answers in each of the instant cases discloses no reference to the so-called "second theory" now contended for. Rather, the deficiency notices disallow petitioners' distributive shares of the subject losses, as to all petitioners, on the grounds of the foregoing corporate-agency issue, and as to eight of the petitioners who were admitted into the partnership on December 31, 1975,[16] on the alternative grounds of disallowance of their distributive shares of any losses sustained by the partnership prior to such admission date. This retroactive allocation issue was conceded by petitioners, and is not in issue in these proceedings.

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[16] These include petitioners Wolcott, Ertan, George, Graham, Toups, Layne, Abshire and

Respondent's so-called "second theory," respecting the allocation of bottom line losses within the partnership, has been placed in issue solely in those six cases in which respondent filed amended answers, and for the first time by such amended answers.[17] As noted in footnote 6, respondent at trial conceded increased deficiencies relating

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Rayford. As to the four additional petitioners admitted on that date, respondent determined no deficiencies against petitioners Prince and Norton for 1975, and failed to raise the retroactive allocation issue by way of the deficiency notice or his answers, against petitioners Frink and Frem F. Boustany, Sr.

17. It is clear that the retroactive allocation of losses for partners entering BHPP late in 1975, and the substantial economic effect of the allocation of losses under the partnership agreement, as amended, for 1975 through 1977, are distinct issues. Indeed, respondent emphasizes this distinction on brief, cautioning that "Petitioners appear to confuse disproportionate allocation and retroactive allocation."

to this issue as to three of these six petitioners. When asked by the Court whether he was withdrawing his amended answers as to these three petitioners, respondent replied in the affirmative.

It is clear that respondent seeks to raise an alternative theory in each of the instant cases. It is equally clear that such new matter must be properly pleaded by respondent. Estate of Horvath v. Commissioner, 59 T.C. 551, 556 (1973); Tauber v. Commissioner, 24 T.C. 179, 185 (1955). If the new matter is raised neither in the pleadings nor in an amendment thereto, then the issue ordinarily will not be heard by this Court. Rollert Residuary Trust v. Commissioner, 80 T.C. 619, 636 (1983), on appeal (6th Cir. August 29, 1983); Markwardt v. Commissioner, 64 T.C. 989, 997 (1975); Estate of Mandels v. Commissioner, 64 T.C. 61, 73 (1975); Robertson v. Commissioner, 55 T.C. 862, 865 (1971). Since respondent has properly pleaded this new matter in only six of the instant cases, and then has withdrawn such pleading in three of those, and since we conclude that petitioners in the remaining fourteen docketed cases have had no fair notice of such matter, Markwardt v. Commissioner, supra at 997; Rule 31(a),[18] we proceed to a consideration of this second issue in the only three cases with respect to which it is properly before this Court, to wit:

Petitioners	Docket No.
David R. Carpenter Erica J. Carpenter	26988-82
Kenneth G. Fink, Jr. Carol Fink	26993-82
Donald L. McCollister Sandra M. McCollister	26994-82

Respondent, as he has acknowledged, bears the burden of proof on this issue. Rule 142(a).

Section 704(a) generally provides

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[18] All references to Rules are to the Tax Court Rules of Practice and Procedure, and all statutory references herein are to sections of the Internal Revenue Code of 1954, as amended and in effect for the years in issue, unless otherwise stated.

that a partner's share of income, gain, loss, deduction, or credit shall be determined by the partnership agreement. For the tax year in issue, the general rule is limited by section 704(b), which provides that an allocation will be disregarded if it lacks substantial economic effect.[19] Pursuant to this test, an allocation of bottom line income or loss, or any item thereof, must have economic substance in the sense that it reflects the actual division of income or loss among the partners when viewed in light of economic, rather than tax, consequences. Goldfine v. Commissioner, 80 T.C. 843, 850 (1983). Thus, the partner to whom an item is allocated for tax purposes must also bear the economic benefits and burdens of that item. Goldfine v. Commissioner, supra at 851. In order to have substantial economic effect, a partner's allocation of bottom line income or loss, or of any item thereof,[20] must meet the test enunciated by this Court in Goldfine, as follows:

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[19] Sec. 704 was amended by sec. 213(d), Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, 1548. Sec. 704.b), as amended, replaced the former tax avoidance or evasion test with the substantial economic effect test, for taxable years beginning after December 31, 1975.

> If a partner's allocation of an item of income or deduction is reflected in his capital account and if the liquidation proceeds of the entity are distributed in accordance with the capital account balances, the allocation has substantial economic effect. [Citation and footnote omitted.] Moreover, where a partner's capital account registers a deficit, he must have the obligation upon liquidation to restore that deficit. Absent such an obligation, the other partner or partners would have to bear

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[20] As recently noted by this Court, "[W]hatever the distinctions under pre-1976 law between 'item' allocations and 'bottom line' allocations, a discussion at long last laid to rest by the Tax Reform Act of 1976 * * *." Goldfine v. Commissioner, 80 T.C. 843, 855 (1983).

> part of the economic cost of the special allocations that resulted in the deficit capital account.

Goldfine v. Commissioner, supra at 852.[21]

In the instant case, petitioners David R. Carpenter, Kenneth G. Fink, Jr. and Donald L. McCollister each became partners in commendam of BHPP for the first time on December 16, 1977, acquiring their partnership interests as follows:

Petitioner	Percentage partnership interest	Contribution
Carpenter	.5	$ 50,000
Fink	1.488	148,800
McCollister	.3	30,000

As we have found, there were six partners in commendam who were newly admitted pursuant to the second amended partnership agreement, including Carpenter, Fink and McCollister. From the time of their admission until December 31, 1977, these six partners were allocated 97.2 percent of all of BHPP's items of profit and loss. Collectively, these six partners owned a 5.888 percent interest in the partnership. As we have also found in section I, supra, the partnership was entitled to losses in the amount of $593,913, as claimed, for the same period. On their individual returns for 1977, Carpenter, Fink and McCollister claimed as their distributive shares of such losses, the respective amounts of $49,022, $145,890, and $29,413.[22]

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[21] See also Hirsch v. Commissioner, T.C. Memo. 1984-52.

In support of his contention that the allocation of losses to the foregoing petitioners in 1977 lacked substantial economic effect, respondent contends, first, that where the capital accounts of such petitioners registered a

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22. These deductions were apparently computed by applying to this 97.2 percent share of the losses for 1977, or $577,283.43, a fraction consisting of the ratio of each petitioner's partnership interest to the total 5.888 percent interst of the newly admitted partners.

deficit, they would not have the obligation to restore that deficit upon liquidation, and second, that the liquidation proceeds of BHPP would not be distributed in accordance with capital account balances.

There is no dispute herein that the allocation of losses to petitioners Carpenter, Fink and McCollister were reflected in their capital accounts for 1977.

Based upon the stipulation of the parties to the effect that each partner in commendam, including the three subject petitioners, would so testify, we have found that in the event of liquidation of the partnership, partners registering deficit balances in their capital accounts would not be required to restore such deficits. However, the factual circumstances here differ from those in Goldfine and Orrisch v. Commissioner, 55 T.C. 395 (1970), affd. per curiam, an unreported opinion (9th Cir. 1973), where we held that where a partner's capital account registers a deficit, he must have the obligation upon liquidation to restore that

deficit upon liquidation does not alone invalidate the allocations in issue.[24]

We turn next to a consideration of whether respondent has met his burden of proving that the proceeds upon liquidation of BHPP would not be distributed in accordance with capital account balances under the December 16, 1977 amendment to the partnership agreement.

Pursuant to the amended agreement, upon a sale of all or part of BHPP's property, the proceeds would be distributed, in the "sole discretion" of the general partners, to certain preferred groups, and then in the following percentages to certain generic groupings of partners in commendam, including an allocable percentage of 14.710 for the newly admitted partners. Within each such grouping, the proceeds would be distributed in proportion to each partner's ownership of "partnership stock." The "newly admitted" grouping consisted of the six partners admitted on December 16, 1977, including Carpenter, Fink and McCollister, to whom were allocated a 97.2 percent share of losses for the period during which they were partners in 1977. Thus, in the event of a sale in liquidation, these six partners would receive almost 15 percent of the proceeds, without regard to their capital accounts or to adjustments thereto resulting from the percentage share of losses to which they were entitled during their participation in the partnership in 1977.

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[24] See Dibble v. Commissioner, T.C. Memo. 1984-589.

Furthermore, as to distributions within the grouping of six "newly admitted" partners, the proceeds of any liquidation were to be distributed in proportion to the ownership of "partnership stock" by each such partner. The amendment to the partnership agreement defines "partnership stock" as "cash or other property furnished to the Partnership by a Partner as set out in Article 2808 of the Revised Civil Code of Louisiana and other applicable law, as amended."[25] By

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[25] La. Civ. Code Ann. art. 2808 (West 1952, provides as follows:

> Property, when brought into partnership, or acquired by it, and the

contrast, "capital account" is defined in the amendment so as to include the original contribution of each partner, *adjusted* for additional contributions, allocable gains or losses, withdrawals by a partner, and distributions to a partner. It is therefore clear that the 14.710 percentage to which the six new partners would be entitled in the event of a liquidation, would be distributed among such partners in a proportion which would not be based upon their capital account balances.

Since the proceeds upon liquidation of BHPP would not be distributed to petitioners Carpenter, Fink and McCollister in accordance with their capital account balances, we conclude that respondent has met his burden of proving that the subject allocations of losses were without substantial economic effect. *Allison v. United States*, 701 F.2d 933, 940 (Fed. Cir. 1983); *Goldfine v. Commissioner*, *supra* at 856.[26]

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profits, when they are kept undivided for the benefit of the partnership, are called partnership stock.

Where an allocation of losses lacks substantial economic effect, section 704(b) requires that the partner's distributive share of such losses shall be "determined in accordance with the partner's interest in the partnership * * *." By stipulated agreement of the parties, such distributive shares for the three subject petitioners in 1977 have been determined to be as follows:

Petitioner	Distributive share of Partnership loss - 1977
Carpenter	$2,969.57
Fink[27]	8,837.43
McCollister	1,781.74

To reflect the foregoing,

Decisions will be entered under Rule 155.

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26. Compare sec. 1.704-1(b)(2)(ii), Prop. Income Tax Regs., 48 Fed. Reg. 9871 (1983).

27. In an apparent typographical error, the stipulation refers to "Kenneth G. Frink, Jr.," to rather than petitioner Kenneth G. Fink, Jr.

APPENDIX G

[CCH Dec. 41,566(M)] Jesse C. Bollinger, Jr., et al.[1] v. Commissioner.

Docket Nos. 5883-78, 5884-78, 5885-78, 5886-78, 5887-78, 17521-80, 5430-81, 5431-81, 5432-81. T.C. Memo. 1984-560. Filed October 18, 1984. [Appealable, barring stipulation to the contrary, to CA-6. -- CCH]

Charles R. Hembree and Philip E. Wilson, Kincaid Tower, Lexington, Ky., for the petitioners. Mark S. Feuer, for the respondent.

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[1] Cases of the following petitioners are consolidated herewith: Edward H. Peter, Jr., and Mary H. Peter, docket No. 5884-78; Paul W. Hensley and Mary N. Hensley, docket No. 5885-78; Jesse C. Bollinger, Jr., and Suz-Anne Bollinger, docket No. 5886-78; Jesse C. Bollinger, Jr., and Jacqueline Bollinger, docket No. 5887-78; Jesse C. Bollinger, Jr., and Suz-Anne C. Bollinger, docket No. 17521-80; Edward H. Peter, Jr., and Mary H. Peter, docket No. 5430-81; Jesse C. Bollinger, Jr., and Suz-anne C. Bollinger, docket No. 5431-81; Paul W. Hensley and Mary N. Hensley, docket No. 5432-81.

MEMORANDUM FINDINGS OF FACT AND OPINION

WILES, Judge: Respondent determined the following deficiencies in petitioners' Federal income taxes:

Petitioner	Docket No.	Taxable Year	Deficiency
Jesse C. Bollinger, Jr.	5883-78	1971	$ 59,989.91
		1972	3,622.44
Edward H. Peter, Jr., and Mary H. Peter	5884-78	1969	3,617.64
		1970	25,227.36
		1971	27,406.41
		1972	3,576.37
		1973	93,571.11
Paul W. Hensley and Mary N. Hensley	5885-78	1967	1,833.82
		1969	3,021.17
		1970	3,653.99
		1971	12,901.76
		1972	5,545.05
		1973	6,335.24
Jesse C. Bollinger, Jr., and Suz-Anne Bollinger	5886-78	1973	103,712.86
Jesse C. Bollinger, Jr., and Jacqueline Bollinger	5887-78	1969	32,986.91
		1970	28,273.84
Jesse C. Bollinger, Jr., and Suz-Anne Bollinger	17521-80	1976	110,823.25
Edward H. Peter, Jr., and Mary H. Peter	5430-81	1976	35,161.66
		1977	99,060.34
Jesse C. Bollinger, Jr., and Suz-Anne C. Bollinger	5431-81	1977	84,553.74
Paul W. Hensley and Mary N. Hensley	5432-81	1977	8,876.97

After concessions by the parties, the sole issue for decision is whether the losses generated by the construction and operation of various apartment complexes are attributable to the partnerships which operated the apartment buildings or to the corporation which was created to act as an agent for the partnerships for certain limited purposes.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Petitioners, Jesse C. Bollinger, Jr. (hereinafter Bollinger), Suz-Anne C. Bollinger, husband and wife, resided in Glenview, Kentucky, when they filed their petitions herein. Jesse C. and Suz-Anne C. Bollinger filed joint Federal income tax returns for their 1973, 1974, 1975, 1976, and 1977 taxable years with the Internal Revenue Service Center in Memphis, Tennessee. Petitioner Jacqueline Bollinger (Bollinger's former wife) resided in Louisville, Kentucky, when she filed her petition herein. Petitioners, Jesse C. and Jacqueline Bollinger, filed joint Federal income tax returns for 1969 and 1970 taxable years with the Internal Revenue Service Center in Memphis, Tennessee. Bollinger filed his individual Federal income tax returns for his 1971 and 1972 taxable years with the Internal Revenue Service Center in Memphis, Tennessee.

Petitioners, Edward H. Peter, Jr., (hereinafter Peter) and Mary H. Peter, resided in Louisville, Kentucky, when they filed their petitions herein. Edward H. and Mary H. Peter, filed joint Federal income tax returns for their 1969, 1970, 1971, 1972, 1973, 1974, and 1975 taxable years, and an amended tax return for their 1973 taxable year, with the Internal Revenue Service Center in Memphis, Tennessee.

Petitioners, Paul W. Hensley (hereinafter Hensley) and Mary N. Hensley, husband and wife, resided in Lexington, Kentucky, when they filed their petitions herein. Paul W. and Mary N. Hensley, filed joint Federal income tax returns for their 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, and 1977 taxable years with the Internal Revenue Service Center in Memphis, Tennessee.

During the years in issue, Bollinger was engaged in the business of real estate development. Bollinger, either individually or in partnership with others, developed the following apartment complexes in the State of Kentucky: Creekside North Apartments; Carriage Hill Apartments; Creekside South Apartments; Les Chateaux Apartments; Lamplighter Apartments; Two Lakes Apartments; Ski Lodge Apartments; and Cloister Apartments. In order to obtain construction financing for the various apartment complexes, financial institutions required that the nominal debtor be a corporate nominee of the partnership,[2] and accordingly, record title to the various properties was held by the corporate borrower. The following chart shows the apartment complex constructed, the partnership constructing the complex, the individual's interest in the partnership, and the corporate nominee holding title:

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[2] For the purposes of this opinion the term partnership includes sole proprietorship.

Apartment Complex	Partnership	Individual's Interest in the Partnership						Title
		Bollinger	Peter	Hensley	George Martin	Samuel Zell	Robert Laurie	
1. Creekside North*	*	100%						Creekside Inc (1)
2. Carriage Hill	Carriage Hill	66-2/3%		33-1/3%				Creekside Inc
3. Creekside South	Creekside South	50%	50%					Creekside Inc
4. Les Chateaux	Les Chateaux	33-1/3%	33-1/3%	33-1/3%				Creekside Inc (Sold Sept 1971)
5. Lamplighter	Lamplighter	33-1/3%	33-1/3%	33-1/3%				Creekside Inc
6. Two Lakes	Two Lakes:							
	7/16/71-9/10/74	50%				50%		Creekside Inc
	9/10/74-2/6/75	2%				98%		Howard Walker Trustee
	After 2/6/75	0				100%		Howard Walker Trustee
7. Ski Lodge*	*	100%						Creekside Inc (Sold 1975)
8. Colister	Cloister							Cloisters Inc
	7/15/73-1/4/74	50%			50%			(Until 12/31/74) (2)
	1/4/74-11/5/75	9-1/2%			9-1/2%	81%		Greenland VistaInc (3)
	After 11/5/75	0			0		19%	(After 12/31/74)

*Sole proprietorship.

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(1) Creekside, Inc., a Kentucky corporation wholly owned by Bollinger.

(2) Cloisters, Inc., a Kentucky corporation wholly owned equally by Bollinger and Martin.

(3) Greenland Vistas, Inc., a Delaware corporation in which petitioners had no interest.

Sometime during 1968, Bollinger sought to construct an apartment complex on a portion of land owned at the time by Beacon Hill, Inc. In order to secure the construction loan and permanent financing for the proposed development of the Creekside North Apartments, Bollinger consulted with Mr. Bryan Sumner (hereinafter Sumner), a mortgage banker in Louisville, Kentucky.[3] Bollinger was advised that financing could be obtained for real estate development projects only through a "corporate nominee." During the years in issue, Kentucky law provided that a loan made to a noncorporate borrower at a rate exceeding 7 percent per annum was usurious. During such period, the prevailing local interest rate for construction financing was over 7 percent. In order to obtain the construction loan and permanent financing, the financial institutions required that the nominal debtor be Bollinger's corporate nominee, and accordingly, record title to the property would be held by the corporate borrower. On July 24, 1968, Sumner obtained a loan commitment for permanent financing from Massachusetts Mutual Life Insurance Company (Massachusetts Mutual Life) in which Massachusetts Mutual Life agreed to loan "the corporate nominee of Jesse C. Bollinger, Jr.", $1,075,000 at an interest rate of 8 percent per annum. The loan was to be secured by a mortgage on Creekside North Apartments and by a personal guarantee of Bollinger.

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[3] Bollinger would first obtain a commitment for permanent financing, in which a financial institution, usually an insurance company, agreed to loan him the anticipated cost of the project after the project was completed. The actual funds for construction were obtained from another financial institution, usually a bank, through a construction loan. When the project was completed, Bollinger would use the permanent financing to pay off the construction loan.

Bollinger, desirous to hold title in the apartment complex in his individual name, conferred with his accountant and his attorney, whereupon he was advised that the use of corporate nominees in order to obtain construction financing was common practice in the State of Kentucky. On October 14, 1968, Bollinger incorporated Creekside, Inc., under the laws of the Commonwealth of

Kentucky, for the sole purpose of having a nominee corporation to secure financing for the development of his apartment projects. At all relevant times Bollinger was the sole shareholder of Creekside, Inc.

On October 15, 1968, Bollinger and Creekside, Inc., entered into an agreement which generally provided that Creekside, Inc., would hold title to the Creekside Apartment Complex as Bollinger's agent only for the purpose of securing temporary and permanent financing of the project.[4]

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[4] The nominee agreement provided in pertinent part:

> Whereas, Bollinger proposes to construct apartments * * * in Lexington, * * * Kentucky. Said apartments to be known as Creekside Apartments * * *, and * * *
>
> Whereas Citizens Fidelity Bank & Trust Company and Massachusetts Mutual Life Insurance Company have agreed to make such a mortgage loan, but have required that the real property securing such mortgage loan be held in the name of a corporation and such mortgage loan be made in the name of a corporation in order that such loan may bear an interest rate in excess of 7% per annum, and
>
> Whereas, Creekside has agreed to hold the Creekside Apartments for Bollinger as the agent and nominee of Bollinger for the sole and only purpose of securing both temporary and permanent financing of the Creekside Apartment Project.

To finance construction of the Creekside North Apartments, Bollinger, through Creekside, Inc., borrowed the funds from Citizens Fidelity Bank and

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Now, Therefore, in consideration of the premises and the mutual covenants and agreements hereinafter made, it is herein and hereby agreed by and between Bollinger and Creekside as follows:

1. Creekside will accept a deed from Beacon Hill, Inc. * * * and will immediately mortgage such property to either Citizens Fidelity Bank & Trust Co. or Massachusetts Mutual Life Insurance Company for the purpose of acquiring funds with which to pay the purchase price for such lot and construct said apartments.

2. Creekside admits and declares that it will hold such property as nominee and agent for Bollinger and will convey, assign or encumber the property and disburse the proceeds thereof and dispose of the property, any purchase money, promissory notes, mortgages and trust deeds arising out of any sale thereof as and only as Bollinger may direct in writing.

3. Creekside does not obligate itself to care for or maintain the property or to advance money on account thereof whether for taxes or otherwise or to assume any liability for payment of money by execution of promissory notes or otherwise.

4. Bollinger does, herein and hereby, agree to indemnify and hold Creekside harmless from and against any liability it may or might sustain by reason of its acting as agent and nominee for Bollinger under the terms hereof.

Trust Company (hereinafter Citizens Fidelity). Creekside, Inc., executed all necessary loan documents including the promissory note, mortgage, and deed. Upon receipt, Creekside, Inc., transferred all loan proceeds to Bollinger's individual construction account.

Bollinger acted as general contractor during the construction of the Creekside North Apartments, and he employed Hensley on a fixed fee basis as construction supervisor. Hensley supervised the construction, ordered materials, scheduled the work and received, reviewed, and approved all invoices. After conferring with Bollinger about construction invoices submitted for payment, costs of the construction were paid by Hensley from the construction account. On completion of the Creekside North Apartments, Bollinger, through Creekside, Inc., obtained permanent financing from Massachusetts Mutual Life in accordance with its commitment letter of July 24, 1968. This loan was secured by a mortgage upon Creekside North Apartments and by a partial personal guarantee executed by Bollinger. The loan proceeds received from Massachusetts Mutual Life were used to pay off the prior construction loan obtained from Citizens Fidelity.

During all relevant times, Bollinger intended to retain all but record title to the property and apartment complex, and he intended that the corporation would convey record title to him as soon as conveyance became feasible. Bollinger always regarded himself as the real owner of the property. On November 8, 1979, Creekside, Inc., conveyed title to the property to Bollinger.

After the Creekside North Apartments were completed, Bollinger employed Mr. John Thompson (hereinafter Thompson) as resident manager to rent the apartments, execute leases for apartment rental, collect and deposit the rent received, and maintain operating records. Thompson deposited all rental receipts into, and paid all operating expenses from, a separate operating account at Central Bank and Trust Company in Lexington, Kentucky. Although the operating account was first opened in the name of Creekside, Inc., it was changed during 1971 to "Creekside Apartments, a partnership."

The operation of the Creekside North Apartments generated losses in the amount of $41,071.17, $7,758.14, $3,416.76, $6,815.61, and $13,342.03, for the taxable years 1969, 1971, 1972, 1973, and 1974, respectively, and generated ordinary income in the amounts of $722.62, $25,805.62, $37,285.22, and $34,511.34, for the taxable years 1970, 1975, 1976, and 1977, respectively. The income and losses generated by Creekside North Apartments were reported by Bollinger on his individual income tax returns throughout the years in issue.

Petitioners secured financing for the construction of Carriage Hill, Creekside South, Les Chateaux, Lamplighter, Two Lakes, Ski Lodge, and Cloister Apartments through the use of a corporate nominee. In each case, the pattern was substantially identical to the development of the Creekside North Apartments. For each of the respective apartment complexes the financial institution required that the construction loans and permanent financing be made to a corporate nominee with at least a partial personal guarantee by the partners; the partnerships executed nominee agreements, which were similar in all relevant respect to the agreement set forth in note 4, supra, with the corporation for the sole purpose of obtaining the financing; and the corporation transferred the construction loan proceeds upon receipt to the partnership's construction account from which all invoices were paid by the construction supervisor hired by the partnership.

Upon completion of each of the respective apartment complexes, the corporate nominee secured permanent financing which was used to pay off the construction loan. Each partnership actively managed its respective apartment complex depositing all rental receipts into, and paying all expenses from, a separate partnership account. Income and losses generated by each of the apartment complexes, except Ski Lodge, were reported by the respective partnerships on U. S. Partnership returns (Form

1065) filed for the years in issue. Petitioners in turn reported their distributive share of the partnership income and losses on their individual income tax returns filed during the years in issue. Bollinger reported the income and losses generated by Ski Lodge Apartments, a sole proprietorship, on his individual income tax returns.

At all relevant times, Bollinger, or the respective partnership, intended to retain all but record title to the apartment complexes. They always regarded themselves as the real owners of the property. It was only because the financial institutions would not provide either a partnership or an individual a construction loan or permanent financing for development of the projects that record title to the property was held by a nominee corporation, either Creekside, Inc., or Cloisters, Inc. In fact, in all loan commitment letters, except the one for Cloister Apartments, the financial institution required that the loan be made to the corporate nominee of Jesse C. Bollinger.

Creekside, Inc., acted as corporate nominee for the Carriage Hill, Creekside South, Les Chateaux, Lamplighter, Two Lakes, and Ski Lodge Apartments. Cloisters, Inc., acted as the corporate nominee for Cloister Apartment partnership. In order to secure the financing, Creekside, Inc., or Cloisters, Inc., as an agent for the respective partnership pursuant to the nominee agreement, signed the loan agreements, mortgages, deeds, and promissory notes in order to obtain the needed financing. At all relevant times, the lenders regarded Bollinger, or the respective partnership, as the owners of the apartment complexes. Financial institutions required partial personal guarantees from the partners and looked to them for repayment.

During the years in issue, Creekside, Inc., and Cloisters, Inc., had no liabilities, assets, employees, or bank accounts; nor did they manage the apartment complexes once the buildings were placed into service.

In the statutory notices of deficiency, respondent disallowed the partners' claimed loss deductions determining that the partnership was not entitled to deduct expenses incurred during the construction, leasing, and operating of the various apartment complexes.[5] Respondent determined that such losses were those of the corporation which held record title to the real estate, either Creekside, Inc., or Cloisters, Inc.

OPINION

The sole issue for decision is whether the losses incurred by the construction and operation of the apartment complexes are attributable to the corporation or to the individual partners in the partnership. Petitioner argues that the corporation acted solely as an agent of the partnership, holding record title to the properties and obtaining project financing on behalf of the partnership only because of local usury restrictions. Thus, petitioners conclude that the partnership, as the principal, is the entity which is responsible for the tax consequences of the construction project. On the other hand, respondent maintains that there is no agency relationship recognized for tax purposes between the corporation and the partnership and that the losses generated by the projects are properly attributable to the corporation.

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[5] We note that in the statutory notice, respondent maintained inconsistent positions with respect to the partnerships; he disallowed the loss deduction to the partners when the partnerships generated losses, but attributed the income to the partners in the latter years when most of the partnerships generated income.

We have carefully considered the issue of whether a corporation will be treated as a nontaxable agent for a partnership in Roccaforte v. Commissioner [Dec. 38,122], 77 T.C. 263 (1981), revd. [83-2 USTC para. 9452] 708 F.2d 986 (5th Cir. 1983), and Ourisman v. Commissioner [Dec. 40,958], 82 T.C. 171 (1984), both Court Reviewed Opinions. In Roccaforte, the taxpayers formed a partnership to build and operate an apartment complex. As in the present case, in order to secure financing for the projects, the lenders required that the nominal borrower be a corporation in order to avoid the state usury limitations. The partners formed a corporation and executed an agreement providing that the corporation was to act only as an agent for the partnership to obtain financing, that the partners remained the owners of the realty, and that the corporation would act only upon the authorization of the partners. The agreement further provided that the partners would hold the corporation harmless for all acts and debts related to the apartment complex. The corporation acquired record title to realty and executed the document necessary to obtain both the construction and the permanent loans. Several of the partners personally guaranteed the loans. The corporate creditors were all aware that the corporation represented the partnership. The corporation supervised the construction and maintained a checking account into which it deposited the loan advances and from which it made interest and progress payments. The corporation had no assets, liabilities, income, or expenses; nor did it manage the apartment complex once the building was placed in service.

In Roccaforte, we decided that in National Carbide Corporation v. Commissioner [49-1 USTC para. 9223], 336 U.S. 422, 437 (1949), the Supreme Court established the following six factors to the considered in determining whether a true corporate agency relationship exists: (1) whether the corporation operates in the name and for the account of the partnership; (2) whether the principal is bound by the corporate-agent's actions; (3) whether the corporate-agent transmitted the money received to the partnership; (4) whether receipt of income is attributable to the assets or employees of the partnership; (5) whether the corporate-agent's relationship with the partnership was dependent on the fact that it was owned and controlled by the partners; and (6) whether the corporation's activities were consistent with the normal duties of an agent. No one factor is mandatory and absolute.[6]

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[6] In Roccaforte v. Commissioner [Dec. 38,122], 77 T.C. 263 (1981), revd. [83-2 USTC para. 9452]

In Ourisman we reiterated our position that a corporation may, under the proper facts and circumstances, be considered as a true agent of the partnership. In Ourisman, the partnership wished to construct an office building. As in the present case, the usury laws prevented financial institutions from loaning the money directly to the individuals or the partnership. In order to obtain the financing, the lender required that the nominal debtor be the

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708 F.2d 986 (5th Cir. 1983), the Fifth Circuit reversed the finding of the Tax Court and held that the fifth factor is mandatory and absolute. 708 F.2d at 989. However, in Ourisman v. Commissioner [Dec. 40,958], 82 T.C. 171 (1984), we disagreed with the Fifth Circuit's interpretation of National Carbide v. Commissioner [49-1 USTC para. 9223], 336 U.S. 422 (1949), and decided to continue to follow our decision in Roccaforte. Since appeal of the instant case lies to other than the Fifth Circuit, we are not required to follow the Fifth Circuit's decision in Roccaforte. Golsen v. Commissioner [Dec. 30,049], 54 T.C. 742 (1970), affd. [71-2 USTC para. 9497] 445 F.2d 985 (10th Cir. 1971). We note, however, that the Fifth Circuit concluded, in a situation where the same parties did not own a controlling interest in both the partnership and the corporation, that the purported principal, the partnership, was in fact not the owner of the purported corporate agent. See Moncrief v. United States [84-1 USTC para. 9417], 730 F.2d 276 (5th Cir. 1984).

corporate nominee of the partnership, and accordingly, record title to the leasehold was held by the corporate nominee. The corporation executed the loan agreements as well as the promissory note and the deed of trust. The partners personally guaranteed payment of the construction loan and the partners always regarded themselves as the real owners of the property. As in the present case, the corporation never opened a bank account, loan proceeds were transferred to the partnership, the partnership made all interest and principal payments on the notes, the partnership operated and maintained the buildings, and the partnership reported the income and losses from the operation of the buildings. In Ourisman, applying the indicia of agency specified in National Carbide as we interpreted them in Roccaforte, we held that:

> [T]he present case compels the conclusion that the corporation acted as the partnership's agent in the construction and operation of the office building. The corporation acted in the name and for the account of the partnership. The corpora-

> tion was created at the insistence of the construction lender, which required that the loan be made to the corporate nominee of the partnership. * * * The agreement with the partnership also provided that the corporation would acquire the leasehold, obtain the necessary financing, and erect an office building solely as the nominee of the partnership, which would remain the corporation's principal and the true owner of the leasehold and improvements. [Ourisman v. Commissioner, supra at 181, 182.]

The present case is indistinguishable from Roccaforte and Ourisman, and the facts before us compel the same conclusion reached therein, that is, the partnerships, and not the corporations, were the owners of the apartment complexes for Federal income tax purposes.

Creekside, Inc. and Cloisters, Inc., operated in the name of, and for the account of, the partnerships it represented. For each apartment project, the corporations entered into a separate nominee agreement with the partnership. Pursuant to the agreement, the corporations were not authorized to act except at the direction of the partnership.

Further, the corporations never represented themselves as anything more than an agent of the partnership. Most lenders also required the partners to personally guarantee a portion of the loans needed for various projects. This indicates that throughout the years in issue, Creekside, Inc., and Cloisters, Inc., were acting as an agent for the underlying partnership. Indeed, the banks and financial institutions were well aware that the corporations were merely a shell. In fact, the lenders would not have lent the money directly to the individuals or the partnership because of usury laws and made most of the loan commitments to the corporate nominee of Jesse C. Bollinger.

The corporations also bound the partnerships by their actions. Project creditors were all well aware that the corporations were acting for the partnership. The nominee agreements provided that the partnerships remain the real party in interest with respect to the projects. The partnerships agreed to indemnify and hold harmless the corporation for any liability it might sustain by reason of acting as an agent for the partnerships. The corporations were not obligated to care for or maintain the property. Finally, the partnership made all principal and interest payments on the loan and paid all other expenses associated with the apartment complexes.

The third factor specified by the Supreme Court in National Carbide is whether the corporation transmitted receipts to the partnerships. The only funds which passed to the corporations were the construction and permanent loan advances which the corporation would immediately endorse and forward to the partnership. Rental receipts and expenses were collected by the partnership and deposited immediately in partnership accounts.

The fourth factor is whether the income received from the apartment complexes was attributable to the employees and the assets of the partnerships. At no time throughout the years in issue did either Creekside, Inc., or Cloisters, Inc., have any employees or hire any one to act on its behalf.

Moreover, neither corporation had any assets beyond record title to the various apartment projects and, as soon as practical, the corporations conveyed title to the partnerships. At all relevant times, the partners believed themselves to be, and acted as, the owners of the apartment complexes. The partnerships hired the agents, performed the activities necessary to arrange the construction and operation of the apartment complexes, executed contracts, leases, and paid the costs of constructing and operating the apartment complexes. The partners located the land and coordinated all the activities concerning construction of the apartment complexes. The corporation's only activity consisted of holding record title, executing the necessary loan documents, and endorsing loan advances to the partnerships. On this record we must conclude, as we did in Ourisman and Roccaforte, that the income realized from the buildings was attributable to the efforts and the assets of the partners.

The fifth factor is whether the corporate-agent's relationship with the partners was dependent on the fact that it was owned and controlled by the partners. In the instant case, Creekside, Inc., acted as an agent for seven partnerships: Creekside North; Carriage Hill; Creekside South; Les Chateaux; Lamplighter; Two Lakes; and Ski Lodge. Although Bollinger owned 100 percent of the stock of Creekside, Inc., with the exception of the Creekside North Apartments and Ski Lodge Apartments, Bollinger did not have a 100 percent interest in all the partnerships. Bollinger had a 66-2/3 percent interest in the Carriage Hill partnership; a 50 percent interest in Creekside South and Two Lakes partnerships; and a 33-1/3 percent interest in Les Chateaux and Lamplighter partnerships. Thus, the facts before us are stronger than Roccaforte and Ourisman, where the corporations were controlled and dominated by the identical individuals who were investors in the partnerships.[7] Although Creekside,

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[7] See Moncrief v. United States [84-1 USTC para. 9417], 730 F.2d 276 (5th Cir. 1984)(On

Inc., was not compensated for the services it performed, because in at least five developments the partners did not own the stock of the corporation in the same percentage as their partnership interest, we believe that the agency relationship was not based upon the partners' ownership and control of both entities. See Raphan v. United States [83-2 USTC para. 9613], 3 Cl. Ct. 457 (1983). With respect to Cloisters, Inc., in which the partners' ownership and control of both entities was in the same proportion, we must conclude that the corporate-agent's relationship with the partnership was dependent on the fact of common ownership and control. However, Cloisters, Inc., like Creekside, Inc., was acting as an agent for the partnership because it carried on only negligible activities, all persons dealing with it were aware it was acting as an agent, and the substantial ac-

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similar facts, the court upheld the jury's decision that the corporation acted as a true agent of the partnership because the corporate stock was held entirely by an individual who only had a 25 percent interest in the partnership and thus the partnership was in fact not the owner of the purported corporate agent.)

tivities involved in constructing and operating the building were performed by the partners. Since the corporations acted no differently than independent agents, they should be recognized for tax purposes as such. Ourisman v. Commissioner, supra at 187. See Raphan v. United States, supra at 463 ("Moreover, the narrow purpose of the agency agreement - holding nominal title to avoid usury problems - could have been performed equally well by a corporation unrelated to any of the parties.")

The final National Carbide factor is whether the corporation's activities were consistent with the normal duties of an agent. Both corporations, Creekside, Inc., and Cloisters, Inc., acted as an agent for the partnerships. The corporations executed a nominee agreement with each of the partnerships whereby Creekside, Inc. and Cloisters, Inc., agreed to hold title to the property for the sole purpose of obtaining financing for the construction of the apartments. Pursuant to that agreement the corporations executed the necessary documents to secure both temporary and permanent financing for the partnerships' projects. The lenders were all fully aware that the corporations were acting as an agent of the partnerships and merely holding legal title to the property in order to satisfy the lenders' financing requirements. The corporations did not act in any manner which could be interpreted as an assertion of principalship.

On this record we must conclude, as we did in Roccaforte and Ourisman, that petitioners have clearly established that the corporations were acting as the partnerships' agent in the construction and operation of the various apartment complexes. What we stated in Roccaforte is equally applicable herein:

> We are convinced that the investors desired to operate in partnership form and were forced to form a corporation to comply with the State's usury laws. The partners did not attempt to avail themselves of the normal benefits of the corporate form such as limited liability. Rather, the partners remained subject to the claims of creditors and to all other claims aris-

ing out of the apartment project.

We believe that the entire substance of the arrangement was one of an agency relationship, and even the form (outside of the corporation's primary liability on the mortgages) indicated the agency relationship that was intended. We are not presented here with the use of a corporation as a tax-avoidance scheme. Rather, the partners were forced to form a corporation in order to get financing for their project. They sought none of the traditional insulating benefits of a corporate shareholder. In substance, the partners were the true economic owners of the property with all the risks and benefits attendant thereto. In such cases, where the corporation was formed solely to satisfy the requirement of the bank in complying with State usury laws and the indicia of an agency relationship are present, we will respect the status of the corporation as an agent of the partnership. [77 T.C. at 278-288 (fn. ref. omitted), cited in Ourisman v. Commissioner, supra at 184.]

To reflect the foregoing concessions by the parties,

Decisions will be entered under Rule 155.

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Supreme Court, U.S.
FILED
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Nos. 86-1151 and 86-1152

In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY R. FRINK, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

JAMES M. GEORGE, ET UX., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a corporation formed by the controlling partners of a real estate partnership to hold title to property, and to obtain financing that the partnership itself could not obtain, can be disregarded for federal income tax purposes on the theory that it is merely an "agent" of the partnership.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

These cases arise out of the same transaction and were consolidated for decision in the Tax Court, but appeals from the Tax Court's decision went to different courts of appeals. The opinion of the Fourth Circuit in No. 86-1151 (Pet. App. 1a-17a) is reported at 798 F.2d 106. The opinion of the Fifth Circuit in No. 86-1152 (Pet. App. 20a-42a) is reported at 803 F.2d 144. The opinion of the Tax Court (Pet. App. 62a-136a) is unofficially reported at 49 T.C.M. (CCH) 386.

JURISDICTION

The judgment of the court of appeals in No. 86-1151 was entered on August 8, 1986, and a petition for rehearing was denied on September 16, 1986 (Pet. App. 18a-19a). On December 12, 1986, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 86-1151 to and including January 14, 1987. The judgment of the court of appeals in No. 86-1152 was entered on October 24, 1986 (Pet. App. 43a), and a petition for rehearing was denied on December 2, 1986 (Pet. App. 44a-45a). The petitions for writs of certiorari in both cases were filed on January 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are limited partners in the Biloxi Hotel Properties Partnership (BHPP), a Louisiana limited partnership (Pet. App. 89a). BHPP is the successor to a partnership formed in 1972 by John C. Yemelos (Yemelos) to develop a hotel in Biloxi, Mississippi (*id.* at 4a, 26a, 72a). Yemelos became one of the two general partners in BHPP, and his interest in the partnership at all times exceeded 50% (*id.* at 26a, 72a).

The partnership was unable to obtain construction financing for the hotel because the market rate of interest exceeded the maximum rate of interest that could be charged to noncorporate borrowers under Mississippi usury law (Pet. App. 27a, 73a). Because the usury restriction did not apply to corporate borrowers, an attorney for the lender proposed that a corporation he owned be used to borrow the money. This corporation was named C.M. Conduit, Inc. (Conduit), and the attorney stated that he had used it to solve similar problems for other clients. It was proposed that Conduit would be paid a fee of $1,000.

The lender rejected that proposal, in part because it objected to the use of the word "conduit" in the corporate name. Instead, the parties agreed to use a corporation named Argo Hotels, Inc. (Argo) to hold title to the property and to borrow the funds. Pet. App. 4a-5a, 27a. Yemelos and his wife owned 100% of Argo's stock. *Ibid.*

In 1973, Yemelos caused the partnership to transfer legal title to the real estate to Argo. Argo then obtained a $6.7 million loan that was guaranteed by Yemelos and his wife (Pet. App. 28a, 80a). The loan documents did not reflect that Argo was acting for anyone other than itself. Yemelos and Argo, however, entered into a side agreement providing that Argo would act as agent for Yemelos in obtaining financing and that Argo would transact no business for its own account while it held record title to the property. The agreement did not provide for payment of any fee to Argo for its services. Yemelos agreed to indemnify Argo against all claims arising under the agreement, to fund all disbursements incident to the loan, and to guarantee the loan personally. *Id.* at 5a-6a, 27a. In 1977, Argo reconveyed the hotel site to BHPP. In 1980, the partnership paid Argo $100 (*id.* at 6a, 30a).

For its 1975-1977 tax years, BHPP reported the various expenses incurred in constructing and operating the hotel on its partnership tax returns. Petitioners in turn claimed their distributive shares of those expenses as loss deductions on their individual tax returns (Pet. App. 7a, 30a). On audit, the Commissioner disallowed those deductions, pointing out that the expenses were incurred by Argo, the corporation that borrowed the money and held title to the hotel, not by BHPP. The Commissioner therefore determined that the expenses were not deductible by petitioners. *Id.* at 7a, 30a-31a.

2. Petitioners sought redetermination of the resulting deficiencies in the Tax Court, where their cases were consolidated. The Tax Court held that Argo should be viewed as a mere "agent" of BHPP for tax purposes, and that BHPP was thus the proper entity to report the interest deductions and other expenses in question (Pet. App. 100a-122a). The Tax Court based its holding on an inference from this Court's decision in *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422 (1949). The Court there rejected the argument that the corporations at issue could be treated as mere "agents" of their common shareholder, reaffirming the rule that "a corporation formed or operated for business purposes must share the tax burden despite substantial identity, in practical operation, with its owner" (*id.* at 429). The Court went on to state, however, that this general rule would not necessarily "foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor" (*id.* at 437). The Court then went on to list certain factors that it deemed relevant to the

determination whether there was a "true" agency (*ibid.*).[1]

The Tax Court held that Argo was a "true corporate agent" as hypothesized by this Court in *National Carbide.* The Tax Court devoted much of its attention to this Court's statement that, "[i]f the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case" (336 U.S. at 437). Although Argo in the instant case was 100% owned by the controlling member of the partnership (Yemelos) and his wife, the Tax Court nevertheless concluded that Argo's relationship to the partnership was not "dependent on the fact that it was owned and controlled by the partners" (Pet. App. 102a-103a, 117a). The Tax Court reasoned that the relationship was arm's-length because Yemelos and his wife owned 100% of Argo's stock, whereas Yemelos' interest in BHPP ranged only from 62% to 69% (*id.* at 117a). The Tax Court then went on to find that each of the remaining *National Carbide* factors supported its conclusion that Argo was the agent of BHPP (*id.* at 104a-113a, 117a-118a). Accordingly, the court held that Argo's corporate existence could be disregarded for tax purposes and that the expenses in question could be deducted by the partners.[2]

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[1] The Court in *National Carbide* described the attributes of a "true corporate agent" as follows, and its description is often broken down (*e.g.,* Pet. App. 102a-103a) into six factors (336 U.S. at 437 (footnotes omitted)):

> [1] Whether the corporation operates in the name and for the account of the principal, [2] binds the principal by its actions, [3] transmits money received to the principal, and [4] whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. [5] If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. [6] Its business purpose must be the carrying on of the normal duties of an agent.

3. The Commissioner appealed, and petitioners cross-appealed from the Tax Court's refusal to allow the partners to deduct all of the expenses in question (see note 2, *supra*). Based on the residences of the various petitioners, two of the cases were appealed to the Fourth Circuit, and the remainder were appealed to the Fifth Circuit. Both courts unanimously reversed the Tax Court and held that Argo was a separate taxable entity under *National Carbide*, and that Argo's existence could not be ignored for tax purposes on the theory that it was a mere "agent" of the partnership.

a. *No. 86-1151.* Adhering to its decision in *Ourisman* v. *Commissioner*, 760 F.2d 541 (1985), rev'g 82 T.C. 171 (1984), the Fourth Circuit held that the *National Carbide* test for a true agency requires proof of an arm's-length relationship between a controlled corporation and its shareholders as a prerequisite to treating the former as an "agent" of the latter (Pet. App. 1a-17a). The court concluded that there was no such arm's-length relationship here. Rejecting the Tax Court's reliance on the fact that the ownership interests in Argo and the partnership were not identical, the Fourth Circuit emphasized that Yemelos at all times held a majority interest in the partnership, was a general partner thereof, and was also in control of Argo through his ownership (together with his wife) of 100% of Argo's stock (*id.* at 9a). The fact that Argo provided its services to the partnership for no fee, the court stated, was strong evidence that the relationship was not truly conducted at arm's length (*id.* at 11a-12a). Pointing to Yemelos' dominant role in conveying the hotel site to Argo on behalf of the partnership, in defining Argo's functions, in guaranteeing its debts, and in causing it to reconvey the improved realty to the partnership in 1977 for nominal consideration (*id.* at 14a), the court concluded that Argo's relations with its supposed principal were "dependent upon the fact that it [was] owned by the principal" (*National Carbide*, 336 U.S. at 437). The court accordingly held that Argo was not a mere "agent" of the partnership under *National Carbide.*

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[2] The Tax Court further held, however, that 11% of the expenses should be allocated to Coastal Golf, Inc., another corporation controlled by Yemelos and his wife, which owned a golf course connected with the hotel project and which the court concluded should not be treated as a mere "agent" under *National Carbide.* See Pet. App. 118a-122a.

The Fourth Circuit also rejected petitioners' contention that an agency relationship should be recognized between Argo and the partnership on the theory that this would reflect the true substance, if not the actual form, of the transaction. In the court's view, the substance of the transaction matched its form because Argo's ability to borrow money under Mississippi law was premised on its status as a corporate principal, rather than as an agent of a noncorporate borrower. In this regard, the court emphasized that the loan documents did not disclose that Argo was acting for anyone other than itself. Pet. App. 13a.

b. *No. 86-1152.* Adhering to its precedent in *Roccaforte* v. *Commissioner*, 708 F.2d 986 (1983), rev'g 77 T.C. 263 (1981), the Fifth Circuit likewise rejected the Tax Court's holding that Argo was an agent of BHPP, noting that the Fourth Circuit had already reached the same conclusion in deciding the appeals of BHPP's other partners (Pet. App. 31a-42a). The court first recited the Tax Court's findings that Argo at all times " 'was a viable and active corporation which performed business activities' " including " 'negotiating loans, entering into contracts, * * * acquiring personal property, subjecting itself to third-party claims during construction, receiving income, incurring expenses, and filing * * * tax returns' " (*id.* at 29a-30a (quoting 49 T.C.M. at 394)). The court then concluded that Argo's separate corporate existence could be ignored under *National Carbide* only if petitioners proved that the relationship between Argo (the supposed agent) and BHPP (the supposed principal) did not depend on their common ownership and control by Yemelos (Pet. App. 32a-37a (citing *National Carbide,* 336 U.S. at 437)). "The significant criteria," the court stated, "are whether the so-called 'agent' would have made the agreement if the so-called 'principals' were not its owners, and conversely whether the 'principals' would have undertaken the arrangement if the 'agent' were not their corporate creature" (Pet. App. 38a (citations omitted)). "In other words," the court stated, "[petitioners] must prove that Yemelos and BHPP dealt with Argo at arm's length" (*ibid.*).

Like the Fourth Circuit, the Fifth Circuit held that petitioners had failed to prove the arm's-length nature of Argo's relationship to the partnership.

The court emphasized that "Yemelos made no provision for compensating Argo in the nominee agreements" and that Yemelos in fact "paid Argo no compensation during the period that Argo actually held title to the assets" (Pet. App. 38a). The court also noted that "Argo acted as an agent for no one other than Yemelos and BHPP" (*id.* at 39a). The court therefore concluded that Argo was not a mere "agent" but was, under *National Carbide,* a separate taxable entity.

DISCUSSION

We believe that the courts of appeals below correctly held that Argo, the corporation formed to obtain financing and hold title to the partnership's real estate project, should not be disregarded as a mere "agent" of its shareholders for federal income tax purposes. The decision below, however, squarely conflicts with the Sixth Circuit's recent decision in *Bollinger* v. *Commissioner,* 807 F.2d 65 (1986), in which we are today filing a petition for a writ of certiorari. Because this circuit conflict can be expected to lead to disparate treatment of similarly situated taxpayers on a question of some importance in tax planning, we do not oppose the grant of certiorari in this case.

1. It is well settled that a corporation organized for a business purpose or engaged in business activity is a taxable entity distinct from its stockholders. *Moline Properties, Inc.* v. *Commissioner,* 319 U.S. 436, 438-439 (1943). Moreover, as this Court stated in *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.,* 417 U.S. 134, 149 (1974), "while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated

or not." In certain circumstances, of course, the Commissioner is free to disregard the transactional form used by the taxpayer, *e.g.*, where the transaction is a sham or is employed solely for tax avoidance purposes. See, *e.g.*, *Gregory* v. *Helvering*, 293 U.S. 465 (1935). But the Tax Court in this case found that Argo was "a viable and active corporation" (Pet. App. 96a), employed here to serve the business purpose of acquiring a loan that was not available to a noncorporate borrower like petitioners' partnership. The fact that Argo was employed for a valid business purpose provides no basis for disregarding its corporate form and treating it as a mere agent of the partnership; indeed, quite the contrary is true. Under general tax principles, therefore, Argo should be treated as a separate taxable entity, and the interest and other expenses incurred by it during 1975-1977 should be deductible by it, and not by petitioners.

Petitioner's argument that Argo should be treated as a mere conduit for tax purposes is based on a dictum in this Court's opinion in *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422 (1949). The Court there *rejected* the contention that four corporate subsidiaries were the "agents" of their common parent, holding that a true agency relationship for tax purposes requires more than the commonality of economic interest and exercise of control that inevitably inheres in the relationship between a corporation and its stockholders. Noting the principle set forth in *Moline Properties* that a corporation is an entity that is to be taxed independently of its owners, the Court stated that "[o]wnership of a corporation and the control incident thereto can have no different tax consequences when clothed in the garb of agency than when worn as a removable corporate veil" (336 U.S. at 430).

The Court in *National Carbide,* however, left open the possibility that a "true corporate agent or trustee" could handle the property and income of its owner-principal without being taxable therefor, listing several factors relevant to that determination (336 U.S. at 437). The Court made clear that a controlled corporation seeking to be recognized as an agent for tax purposes must establish that its relationship with its owner mirrors that of an agent acting for an unrelated principal. "If the corporation is a true agent," the Court stated, "its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case" (*ibid.*). As the Court recognized, the stockholders of a corporation, by virtue of their ownership interest, inevitably cause the corporation to act much as a principal, by virtue of an agency contract, would cause an agent to act, *e.g.*, by holding title to property beneficially owned by the shareholders, or by transmitting profits to them. See *id.* at 436. If such actions were sufficient to make a corporation the nontaxable "agent" of its shareholders, obviously, the entire structure of corporate taxation would collapse. Thus, the special treatment of a controlled corporation as an "agent" of its shareholders can be appropriate only where the shareholders establish that the agency relationship is unaffected by the ownership situation, and that the corporation as "agent" is in fact acting at arm's length with its shareholders as "principal."

Under the guidelines laid down by this Court, we think it clear that the courts below correctly rejected petitioners' attempt to have Argo treated as the mere "agent" of the partnership for tax purposes. Argo was created and operated to serve a legitimate business purpose, and this Court's decision in *Moline Properties* thus requires that Argo be treated as a separate taxable entity. Moreover, the circumstances here—most obviously, the fact that Argo charged no fee—show that the supposed agency relationship between the partnership and Argo was not conducted at arm's length, but rather was "dependent upon the fact that [Argo was] owned by the principal" (*National Carbide*, 336 U.S. at 437). Most importantly, the interest expenses that Argo incurred on the $6.7 million mortgage note really were *its* expenses, not expenses of its shareholders that it was undertaking ministerially to discharge for them. That conclusion is dictated by Mississippi law, under which Argo's ability to borrow the money was conditioned on the fact that it, not the partnership, was the borrower. Petitioner's contention that Argo was acting in a mere agency capacity in taking out the loan is thus completely at odds with the premise upon which the loan was based.

For these reasons, the courts below correctly held that Argo's separate corporate existence should be recognized and given effect for federal tax purposes. Under *National Carbide,* it would be inconsistent with the two-tiered structure of corporate taxation to ignore Argo's corporate form and treat it as nothing but the agent of its shareholders. Accord, *Ourisman* v. *Commissioner*, 760 F.2d 541 (4th Cir. 1985); *Roccaforte* v. *Commissioner*, 708 F.2d 986 (5th Cir. 1983); *Harrison Property Management Co.* v. *United States*, 475 F.2d 623 (Ct. Cl. 1973), cert. denied, 414 U.S. 1130 (1974). Recognition of Argo's separate corporate existence, moreover, works no injustice or unfairness to petitioners. There is no reason why petitioners should be allowed to enjoy whatever economic advantages attach to borrowing through a corporation under state law, only to turn around and disavow that corporate form in the hopes of claiming the corporation's expenses as tax-shelter losses on their personal tax returns.

2. Although we believe the decisions below to be correct, we agree with petitioners' statement (Pet. 14-16) that those decisions conflict with the Sixth Circuit's decision in *Bollinger* v. *Commissioner*, *supra*.[3] On facts similar to those here, the Sixth Circuit held in *Bollinger* that a corporation used to obtain loans that its controlling shareholder could not obtain because of state usury laws should be treated as an agent for tax purposes.[4] While the Sixth Circuit did not refer to either of the two decisions below,

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[3] We disagree, however, with petitioners' contention that the decisions below conflict with *Raphan* v. *United States*, 3 Cl. Ct. 457 (1983), aff'd, 759 F.2d 879 (Fed. Cir. 1985), cert. denied, No. 85-11 (Oct. 7, 1985). The Claims Court in *Raphan* reasoned that the concerns expressed in *National Carbide* are largely satisfied when the principal and agent are not under common control (3 Cl. Ct. at 462), and the court of appeals' affirmance rested on the finding that the principal and agent there were not in fact under common control (759 F.2d at 883). Since in the instant case the partnership and Argo were under the common control of Yemelos, the courts below correctly distinguished *Raphan* (Pet. App. 10a-11a, 36a). See also *Moncrief* v. *United States*, 730 F.2d 276 (5th Cir. 1984); *Carver* v. *United States*, 412 F.2d 233 (Ct. Cl. 1969).

[4] The taxpayers in *Bollinger* were investors in one or more of eight real estate ventures organized by the same general partner. One corporation, wholly owned by the general partner, purported to serve as the "agent" of seven of the ventures. The "agent" of the eighth venture was another corporation owned equally by the two partners in the venture. See *Bollinger* v. *Commissioner*, 48 T.C.M. (CCH) 1443, 1446 (1984). The corporations were not compensated for their services as agents, nor did they serve as agents for any clients other than the ventures organized by the general partner. See generally *id.* at 1444-1449, 1451.

it did state (807 F.2d at 70) that it "decline[d] to follow the Fourth Circuit's view, as expressed in *Ourisman* [v. *Commissioner*]," a decision that was cited as controlling by the Fourth Circuit below (see Pet. App. 9a). The Sixth Circuit concluded that the corporations, which held legal title to property beneficially owned by their shareholders, should be treated as agents because they "acted like agents" (807 F.2d at 70). The Sixth Circuit's rule appears to be that, so long as corporate nominees do not perform any functions that could not also have been performed by an independent agent, the separate existence of those corporations can be ignored for tax purposes (see *id.* at 67-69).

The Sixth Circuit's expansive view of the extent to which individuals may use a corporation to effect business purposes, yet ignore the existence of that corporation for tax purposes when it suits them, cannot be reconciled with the decisions below or with the relevant decisions of this Court. This Court's holding in *National Carbide* makes it clear that the circumstances in which a corporate-shareholder agency relationship can be recognized for tax purposes are extremely limited. Unless true independence is shown—that is, unless the relations between the corporation and its shareholders conform in all respects to the paradigm of an agent dealing with unrelated third parties—the supposed agency relationship manifests nothing more than the underlying ownership relationship and should not be given effect. See *Ourisman* v. *Commissioner*, 760 F.2d at 548. The Sixth Circuit's refusal to recognize this principle, in conflict with other courts of appeals and the relevant decisions of this Court, should be corrected.

3. We believe that the question presented here is sufficiently important to warrant this Court's atten-

tion. As is suggested by the number of cases already decided, the issue whether a controlled corporation is the agent of its stockholders has been a recurring one. By our reckoning, the courts of appeals during the last 15 years have considered no fewer than 17 federal tax cases construing the test for "true corporate agent" set forth by this Court in *National Carbide.* It therefore appears that, unless the conflict is resolved, a number of taxpayers may receive disparate treatment with respect to an issue that has significant tax consequences.

This issue has recently diminished in importance somewhat, at least temporarily, because of the decline in market interest rates, which in turn has reduced the impact of local usury laws. Moreover, many state legislatures have amended their usury laws either to raise the ceiling rate or to make the usury provisions inapplicable to major, commercial transactions. See generally Long, *Trends in Usury Legislation*, 34 U. Miami L. Rev. 325 (1980). These amendments, as well as federal legislation that restricts the operation of local usury laws in certain circumstances,[5] may cause the question presented to arise less frequently in the future. Quite apart from usury laws, however, there have been other problems that have prompted taxpayers to invoke the corporate form, only to seek later to disavow that form for tax purposes.[6] Indeed, one of the two corporations involved in No. 86-1151 was employed for the purpose of limiting the shareholders' personal liability, not as a device for complying with state usury laws (see Pet. App. 5a). Thus, the question whether controlled corporations are to be viewed as mere agents of their owners for tax purposes is likely to continue to arise in the future, whenever the choice of the corporate form for business purposes proves to be disadvantageous from a tax standpoint. Evenhanded administration of the tax laws, as well as predictability in tax and financial planning, will be enhanced by resolution of the conflict on this issue in the courts of appeals.

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[5] See Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 511, 94 Stat. 164 (codified at 12 U.S.C. 86a) (permitting national banking associations to charge interest at a rate not exceeding five points above the Federal Reserve Board discount rate where credit of $1,000 or more is extended for business or agricultural purposes, notwithstanding more restrictive state usury laws); see also Burke & Kaplinsky, *Unraveling the New Federal Usury Law,* 37 Bus. Law. 1079, 1088-1093 (1982).

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[6] For example, taxpayers have sought to avoid the tax consequences attending the corporate form when it was invoked to protect property from creditors of the beneficial owners or to conceal the identity of those owners (*Paymer* v. *Commissioner*, 150 F.2d 334, 336-337 (2d Cir. 1945)); to facilitate the management or conveyance of property owned by a group of investors (*Tomlinson* v. *Miles*, 316 F.2d 710, 711 (5th Cir.), cert. denied, 375 U.S. 828 (1963)); to obtain licenses to conduct business in foreign countries (*Elot H. Raffety Farms, Inc.* v. *United States*, 511 F.2d 1234, 1239 (8th Cir.), cert. denied, 423 U.S. 834 (1975)); to avoid difficulties in administration of property that might arise upon the death of the beneficial owners (*Commissioner* v. *State-Adams Corp.*, 283 F.2d 395 (2d Cir. 1960)); or to avoid personal liability with respect to loans incurred to acquire or improve property (*Vaughn* v. *United States*, 3 Cl. Ct. 316, 317 (1983), aff'd, 740 F.2d 941 (Fed. Cir. 1984)).

CONCLUSION

The petitions for writs of certiorari should be granted, and the cases should be consolidated for briefing and oral argument.

Respectfully submitted.

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NO. 86-1152 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1986

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v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JAMES M. GEORGE and
MARGARET C. GEORGE, et al.,
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ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND FIFTH CIRCUITS

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The Commissioner, recognizing that the Circuit conflicts in Bollinger, Frink, and George[1] can be expected to lead to disparate treatment of similarly situated taxpayers in a question of significant importance in tax and financial planning, did not oppose the grant of certiorari herein. (Res. Brief page 9). Concurrently with the filing of respondent's brief, the Commissioner petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit (No. 86-1672) in Bollinger.

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[1] Bollinger v. Commissioner, 48 T.C.M. (CCH) 1443 (1984), aff'd 807 F.2d 65 (6th Cir. 1986); Frink v. Commissioner, 49 T.C.M. (CCH) 386 (1984), rev'd 798 F.2d 106 (4th Cir. 1986); and George v. Commissioner, Cited in U. S. Tax Court as Frink v. Commissioner, 49 T.C.M. (CCH) 386 (1984), rev'd 803 F.2d 144 (5th Cir. 1986).

BOLLINGER SHOULD BE CONSOLIDATED WITH FRINK AND GEORGE, AND NOT HELD

In its reasons for granting the petition, the Commissioner suggests:

> In the event the Court grants certiorari in Frink and George, it would be appropriate to hold this case [Bollinger] pending the disposition of those cases. (Pet. Brief page 5).

Upon the granting of certiorari, petitioners strongly oppose this suggestion, and strenuously urge that Bollinger be consolidated with Frink and George for purposes of briefing and oral argument. These three cases are the very essence of the conflict giving rise to the grant of certiorari. A wiser decision of this Court will result from its direct consideration of both sides of the conflict. While factually indistinguishable, the idiosyncrasies and nuances of these cases should be considered by this Court together.

THE ISSUE IS IMPORTANT

In furtherance of the Commissioner's discussion of the far-reaching uncertainty of the Frink / Bollinger conflict (Res. Brief page 14), petitioner has recently learned of a similar nominee issue pending before the administrative appeals division of a state department of revenue. The matter is presently being held by the state taxing authorities pending the outcome of these cases. This is further evidence that the even-handed administration of the tax laws, as well as predictability in tax and financial planning, will be enhanced at the state as well as the federal levels by resolution of this conflict.

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